



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1026 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 20th January 2016)

RONALD KAMPA LUGABA.....CLAIMANT

VERSUS

KENOL KOBIL LIMITED.....RESPONDENT

JUDGMENT OF THE COURT

The Claimant's case

1. Ronald Kampa Lugaba filed his Memorandum of Claim on 8/7/2013 through the firm of Rachier & Amollo Advocates. The Claimant's case is that on 18/12/2003 he was appointed by the Respondent as an Operations Trainee in the Operations & Non-Business Development Department at a starting salary of 26,651/= after a competitive recruitment process.
2. He avers that he was deployed in the Respondents Nairobi office at the Joint Depot (Front Office) to the position of Depot Assistant on 16/8/2004. With time he rose up the ranks and was promoted to the position of Depots Assistant where his salary was adjusted to 40,895/= (Appendix RKL 3) on 15/3/2006.
3. It is the Claimant's case that he proved to be outstanding in all his duties and received recognition from his employer in several ways all between the date he was employed to the 1st quarter of 2012. He also states that he was appraised within the same period and his performance found excellent or very good (RKL 4).
4. The Claimant avers that as a result of his good work, his salary kept being adjusted upwards and that by 23/4/2012 he was earning Kshs 210,600/= (RKL). That he was also awarded bonuses at the end of the year for coming up with solutions to ameliorate the company's position (RKL 7).
5. The Claimant state that his hard work earned him promotions from the positions of Depot Assistant in Operations and Project's Development Department to position of Business Process Analyst in the 17 Sections in the head office on 10/12/2009 (RKL 8).
6. On 15/1/2010 he was also nominated as Employee of the year and awarded 132,836/= for his good performance (RKL 9). He was also selected for a training course that was carried out in Israel (RKL 10) on 25/3/2010.
7. It is the Claimant's case that he had a good working relationship with his employer until on or

about May 2012 when all his problems began. That on 5/5/2012, the Respondent announced the intention of PUMA ENERGY, a foreign company's intention to take over the Respondent Company by the purchase of its shares (RKL 12).

8. The Claimant avers that the said 3rd Party representatives organized a reconnaissance visit to the company where they met different heads of Departments and made it unequivocally clear to most people in management that they shall not need all members of staff that were currently working for the Respondent and thus it was clear that once they take over the company they would downsize the number of staff.
9. Following this development and the uncertainty surrounding their employment, the Claimant avers that some employees including the Claimant engaged in the process of negotiations with the Respondent in order to ensure that the employees' rights were taken care of but this was never fruitful as the Respondents top management only gave the employees empty promises.
10. On 15/5/2012, the Claimant amongst other employees moved to the Industrial court seeking to restrain the takeover until all their rights were determined. (RKL-13) is a copy of the statement of Claim filed with regard to that matter.
11. The Claimant avers that his problems started from this point and he was harassed severally by the Respondent.
12. The Claimant avers that in June 2012 he was summoned severally in the offices of top management with a view of coercing him to instruct other employees to withdraw the case but he never relented. Upon his refusal, a series of harassment began.
13. In July 2012, an appraisal was conducted on the Claimant by his immediate boss which ranked him as excellent but the same when presented to the General Manager, revised the rankings cancelling all ratings and replacing them with poor results (RKH -14). On 31/8/2012 the Respondents presented the employees with a prepared document which aimed to reverse the authority the Claimant was granted by other employees as their representative in case 1022/2012. The Claimant declined to sign the document (RKH -15b).
14. On 18/9/2012, the Respondent decided to transfer the Claimant from his current position of Business Process Analyst at Nairobi head office to the position of Depot Assistant at Eldoret which was a demotion and was meant to be effected with 2 days of receipt of the letter a time duration which was unreasonable and intended to cause inconvenience to the Claimant (RKL-16).
15. On 2/10/2012, the Respondent further wrote a letter to Respondent cutting down his salary based on his new portfolio from 2010,600/ to 97,345/= all these contrary to the Labour Law and the Respondents Company Policy all which prohibit revision of salaries downwards. After the transfer, the Claimant was now subjected to compulsory leave on 31/10/2012 for 49 days (Appendix RKL-18).
16. Before he finished the compulsory leave, the Claimant was suspended from duty on 2/11/2012 on baseless grounds and never earned his dues over the entire period of indefinite suspension.
17. On 16/1/2013, the Claimant states that he was finally terminated without any justifiable reason (RKL-20).
18. It is the Claimant's case that he was unfairly treated and his rights violated under Article 26(1) and 47(1) of Constitution. He also avers that Article 41 of the Constitution on fair Labour Practices was violated and he was also subjected to acts of discrimination. He prays for the following reliefs:
 - i. ***Declarative orders declaring that the said termination letter dated 16th january 2013 is unlawful, lacks ,merit and is a violation and infringement of the fundamental freedoms***

in the Bill of rights under Articles 27(5), 41(1), 47(1) and 26(1) of the Constitution.

ii. *Declarative orders declaring that the Claimant's termination should only take effect when the Respondent conforms to all legal requirements stipulated by the Constitution, statute and the employment contract and therefore declare that the Claimant is entitled to his monthly salary until the Respondent's terminate his services within the law.*

iii. *An order of compensation as directed by Article 23(3) of the Constitution by the Respondent's breach of his right to life under Article 26(1) by the breach of his right to earn a livelihood for the remainder of his 14 years and 9 months he has until attaining the retirement age at the following rate:*

$$\text{Monthly salary} \times 12 \text{ months in a year} \times 14 \text{ years 9 months of service } (14.75 \times 12) \times 210,600.00 = \text{Kshs.}37,276,200.00.$$

iv. *Order the Respondent to pay General Damages to the Claimant for unfair termination of employment as contemplated in Section 12 (3) (vi) of the Industrial Court Act.*

v. *Order the Respondent pays the Claimant 12 month's salary on the gross monthly salary at the time of dismissal as stipulated under Section 49 of the Employment Act as compensation for unfair termination thus:*

$$12 \times 210,600.00 = \text{Kshs.}2,527,200.00$$

vi. *Order that the Respondent issues severance pay as provided for under Section 40(1) (g) of the Employment Act and Section 49 (4) (h) to the Claimant calculated below:*

½ months salary x years worked

$$\frac{1}{2} \times 210,600.00 \times 9 = 947,700.00$$

vii. *Order that the Respondent pays the Claimant for his accrued annual leave for 58 days.*

$$(\text{Kshs.}210,600.00 \div 22) \times 58 \text{ days} = \text{Kshs.}555,218.128$$

viii. *Without prejudice to the forgoing an order that the Respondent pays the Claimant his full salary Kshs.210,600.00 per month from the date of his demotion to the date of the purported termination.*

$$\text{Number of months unpaid} \times \text{monthly salary } (2+ [18 \div 22]) \text{ months} \times 210,600.00 = \text{Kshs.}593,509.09$$

ix. *Order that the Respondent pays the Claimant his difference in salary for the month of October as calculated below:*

$$\text{Kshs.}210,600.00 - \text{Kshs.}97,348.00 = \text{Kshs.}113,252.00$$

x. *Order that the Respondent compensates the Claimant for the equivalent of ESOP shares owned by the Claimant in the Respondent Company.*

xi. *Order that the Respondent compensates the Claimant for violating the Claimant's right to fair labour practices under Article 41(1) of the Constitution by the several acts of employee harassment that eventually culminated into the Claimant's termination from service.*

xii. *Orders the Respondent to bear the burden of the cost of this suit.*

xiii. ***Order any other award or benefit that this Honourable Court may deem fit and just to grant in the circumstances of this case.***

xiv. ***Orders the Respondent to pay interest at courts rate on all the above prayers.***

xv. ***Order that the termination can only take effect once the Respondent confirms to all orders issued by the Court.***

Respondent's case

19. The Respondent filed their Memorandum of Response on 3/8/2013 through the firm of Mulanya & Maondo Advocates. The Respondents admit that they had employed the Claimant on the normal course of employment and promoted him in line with the Respondent's HR Policy not because of any outstanding performance.

20. On payment of bonuses, the Respondent avers that this was not only paid to the Claimant but to all staff of the Respondent who delivered on their work for a given year of service as per company practice as payment of an award, they aver that the same was also given to other employees of the Respondent involved in the project.

21. The Respondents further aver that from May 2012, the Claimant ceased to be a diligent employee and the system he was manning was frequently hacked into exposing the company to great risk and no steps were taken to remedy the same and the services had to intimately be outsourced.

22. The Respondents aver that the Claimant instigated other staff based on false information and perception regarding an intended buyer of the Respondent which was not true hence causing unrest in the company and greatly affecting the performance of the company.

23. The Respondents however deny subjecting the Claimant to harassment. They aver that the assessment of the Claimant was done as per their regulations and that they never victimized the Claimant in any way on account of the case filed in Court.

24. On wage reduction, the Respondent avers that they have no wage structure and an employee is paid according to responsibilities undertaken.

25. On the termination of Claimant, the Respondent avers that the same was done due to restructuring of the company which led to outsourcing of the services. They deny that the termination was unfair and want this case dismissed.

26. I have considered evidence presented by both parties, I find that the issues for determination by this Court as follows:

1. ***Whether the Claimants' termination was due to restructuring of the company or other reasons.***
2. ***For whatever reasons of the termination, whether they were valid.***
3. ***Whether due process was followed.***
4. ***What remedies if any the Claimant is entitled to.***

27. On the 1st issue, from the evidence on record, the Claimant enjoyed good working relations with the Respondent over time. He had grown up in the company from humble beginnings and rose up to senior management level. His good work was recognized by his superiors and his appraisals were always excellent.

28. In 2010, he was the employee of the year and was given an award for outstanding performance of Kshs.132,835/=.

29. The latest of his performance appraisal was done on 25th June 2012. This is when the ratings were apparently altered by the General Manager after he had been rated excellent and very good by his immediate supervisor. This came hot on the heels after the filing of case No. 1022 of 2012 on 15/5/2012.

30. One wonders what happened to the hitherto good employee who had been voted employee of the year in 2009 and sponsored for training locally and abroad.

31. All the apparent mistakes on incompetence complained of against the Claimant including hacking of IT system came after June 2012 after the filing of the case complained of.

32. It is this Court's inference that the reason that there is apparent change of attitude against the Claimant flows from the filing of case No. 1022/1012 halting the intended takeover of the Respondent by a 3rd party. The events that followed point to a calculated move to harass the Claimant including an immediate transfer to Eldoret and a demotion with a reduction in salary.

33. The Respondents have in their evidence stated that the reduction in salary was commensurate with work being done but it's this Court's finding that the reduction in salary and demotion is against Section 10(5) of Employment Act which states that:

“Where any matter stipulated in subsection (1) changes (Section 5(1) deals with terms of contract), the employer shall in consultation with the employee revise the contract to reflect the change and notify the employee of the change in writing”.

34. The key word here is “consultation” and there is no indication this happened even if it was for restructuring purposes.

35. It is my finding that the events following the filing of the case show a calculated move to harass the Claimant to deter him from pursuing his rights in the stated case which is against fair Labour Practices – Article 41 of Constitution. The ILO General Survey on Protection Against Unjustified Dismissal 82nd session 1995, in its report of the Committee of Experts No. 115 stated as follows:

“This invalid reason for termination of employment is an important aspect of employment security as it provides protection for workers against retaliatory measures During the preparatory work, an amendment for the deletion of the expression “in good faith” in the proposed correction was adopted. The author of the amendment considered that protection against termination of employment for having filed a complaint or participated in proceedings against an employer should not depend on the subjective question of whether the worker was acting in good faith”.

36. At comment No. 117, the Committee noted as follows:

“The Committee emphasized more specifically that the effective protection of the principle of equality presupposes the existence of guarantees providing protection against retaliatory measures for a person who lodges a complaint with the appropriate body, who institutes proceedings to enforce his or her rights or who is a party to such proceedings as a witness. Such measures, the most brutal form of which in termination of employment, taken against a person who has suffered discrimination and who availed himself of a right which is his in accordance with the national policy of equal opportunity and treatment are of a particularly serious nature and can have detrimental effects with regard to the practical application of anti-discriminatory provisions as those who have suffered discrimination after hesitate to have recourse to procedures to redress their grievances for fear of reprisals”.

37. In this case I find that the Claimant was terminated due to the fact that he filed a case with others against the Respondent and the reasons given by the Respondent that it was due to the restructuring process remains invalid.

38. The 3rd issue is on due process. It is apparent that due process was never followed. The Claimant was never accorded any hearing as envisaged under Section 41 of Employment Act 2007 which states as follows:

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

39. Even if it was due to restructuring or redundancy as the Respondent avers, the process too was never followed as envisaged under Section 40(1) of Employment Act 2007 which provides as follows:

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 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 to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.*

40. This Court therefore opines that the Claimant was unfairly and unjustly terminated in line with Section 45 (1) & (2) of Employment Act 2007 which states as follows:

1. *No employer shall terminate the employment of an employee unfairly.*
2. *A termination of employment by an employer is unfair if the employer fails to prove:*
 - a. *that the reason for the termination is valid;*

- b. *that the reason for the termination is a fair reason:-*
- i. *related to the employee's conduct, capacity or compatibility; or*
 - ii. *based on the operational requirements of the employer; and*
- c. *that the employment was terminated in*

accordance with fair procedure.

41. It is the finding of this Court in conclusion that the Claimant is entitled to an array of prayers as follows:

1. *Salary Claimant was to earn from 2/10/2012 when he was demoted i.e. – 210,600 – 97,348/= 113,252 /=*

This was done in contravention of Respondents own policy document which stipulates as follows:

“Should an employee be demoted for whatever reason, he will retain his current salary but future increments shall be based on rates pertaining to the new classification”.

2. *Salary in lieu of notice 210,600/=.*
3. *Severance pay at 15 days salary for each completed year of service, the Respondent having attributed the termination to redundancy = $\frac{1}{2} \times 210,600 \times 9 = 947,700/=$.*
4. *12 months as compensation for unlawful redundancy = $210,600 \times 12 = 2,527,200/=$.*
5. *Payment for 58 leave dues not contested by Respondent = $210,600 \times \frac{22}{30} \times 58 \text{ days} = 555,218.18/=$*
6. *Unpaid salary for November and December during the suspension salary = $210,600 \times 2 = 411,200/=$.*

Plus 18 days in January = 182,309/=

TOTAL = 4,947,545.18/=

7. *Claimant be issued with his Certificate of Service and Certificate for his Shares owned in Kenol Kobil shares.*

The Respondent will pay costs of this suit.

The amount due will attract interest at Court rates with effect from the date of this Judgment.

Read in open Court this 20th day of January, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Murugu holding brief for Change for Claimant

Maondo for Respondent