



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1647 OF 2014

GEOFFREY NYABUTI ONGUKO CLAIMANT

VERSUS

BLOW PLANT LIMITED RESPONDENT

JUDGEMENT

1. The issue in dispute is the non-payment of dues and wrongful, unfair and unlawful dismissal.
2. The claim is that in 2010 the Claimant was employed by the Respondent as a Machine operator but on 28th December 2012 he was dismissed without any due cause. He was not issued with any notice or pay in lieu of such notice and as a result he has suffered loss and damage. The Claimant is seeking the following:
 - a) Notice pay at Kshs.11, 445.00
 - b) Unpaid salary for November and December 2012 at Kshs.22, 890.00
 - c) Unpaid leave at Kshs.22, 890.00.
 - d) The Claimant is also seeking for a declaration that his termination was unfair and hence warrant a compensation.
3. In evidence to support his case, the Claimant testified that he served the Respondent diligently from 2010 until 28th December 2012 when he was terminated from his employment on the reasons that there was no work. On 31st December 2012 he went back for his dues but rejected what was paid as it was not adequate. He was not given notice before termination and there was no pay in lieu; he was not heard before termination and the reason given for the termination was not valid. That his salary for November and December 2012 were not paid.
4. In cross-examination the Claimant admitted that he was issued with a letter stating that his termination was due to reduced work and that he was given his dues but the computation was wrong hence he did not take it. There was no notice pay and the November and December salaries were not paid. NHIF, NSSF, November and December salaries – all these were not paid. Before termination he needed a notice to psychologically be prepared.

Respondent's case

5. In defence, the Respondent stated that the Claimant was terminated due to redundancy on account of lack of work at his unit. Upon termination all dues were computed but the Claimant refused to take the same. The termination was lawful but the only outstanding issue is for the Claimant to accept his dues. The claim should be dismissed with costs.

6. In evidence, the Respondent called Allan Ogeta their Human Resource officer as the witness. He admitted that the Claimant was terminated due to redundancy as the Respondent had low sales and had to reduce its staff forcing the termination of the claimant. A termination letter was issued noting the reasons but he refused to take his terminal dues. The Respondent has always been willing to pay such dues. The Claimant refused to take the dues on the grounds that NHIF and NSSF should not have been deducted from his dues and that his November and December salaries should be paid together with a personal relief and that no deductions should be made. Such demands were not valid as in law the Respondent had to make the necessary deductions. Notice pay was offered and at the time of termination, November salary was not due.

7. In cross-examination, the witness admitted that termination was on 28th December 2012 and the reason was given as redundancy. No notice was given before termination.

Submissions

8. In submissions, the Claimant stated that section 40 of the Employment Act regulate redundancies and in this case it was not followed. A notice is to be issued stating that the employer is contemplating redundancy and once this is settled, individual employees must be given notice of termination of their employment as held by the Court of Appeal in **Kenya Airways Limited versus Aviation & Allied Workers Union & 3 Others [2014] elk**. The emphasis here being that there is a general notice to be issued as well as a personal notice as held in **KUDHEIHA versus The Aga Khan University Hospital Nairobi, Cause No. 815 of 2015**.

9. In this case the Respondent failed to comply with the law on redundancy and the resultant termination of the Claimant was unfair hence compensation is due as held in **Hezbon Ngaruiya Waigi versus Equitorial Commercial Bank Limited [2013] eKLR**.

10. The Respondent on their part submitted that it is not contested that the Claimant was terminated due to redundancy as there was no work in his unit. Upon termination, the Claimant was given his dues but he rejected to collect the same. This is not a case of unfair termination. Redundancy is allowed under section 40(1) (b) of the Employment Act and this is not contested by the claimant. Termination was not due to any misconduct to warrant a claim for unfair termination. Notice was given in a letter dated 30th December 2012, leave was earlier paid, and payment in lieu of notice was offered as well as severance pay was offered but rejected.

11. The Claimant is not entitled to any of his claims as the Respondent offered to pay all legal dues in the notice of termination.

Determination.

12. Both parties admit that the Claimant was terminated due to redundancy at the Respondent firm. However despite that admission, the Claimant contest that the applicable law under section 40 of the Employment Act was not followed while the Respondent assert that they did comply and offered to pay all the legal dues but the Claimant rejected the same.

13. Section 40 regulate the redundancy process. Redundancy does not arise due to any mistake of the employee. Rather it is a business situation that the employer must address that results in reduction of staff or reorganisation. Such situations do not arise overnight. An employer must assess and analyse their business and arrive at a decision that a downsizing of staff is necessary or a reorganisation is required to turnaround the business into profits as held in **KUDHEIHA versus The Aga Khan University Hospital Nairobi** case and cited *G N Hale & Son Ltd v Wellington etc. Caretakers etc. IUW [1991] 1 NZLR 151*

(CA), the New Zealand Court of Appeal held;

... This Court must now make it clear that an employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall... The personal grievance provisions ... should not be treated as derogating from the rights of employers to make management decisions genuinely on such grounds. Nor could it be right for the Labour Court to substitute its own opinion as to the wisdom or the expediency of the employer's decision.

14. However, even where such a right exists, the law at section 40 of the Employment Act requires that the employer to inform the employees through a general notification that the redundancy is likely to affect their work and or employment. This is what the Court of Appeal has termed as issuing a *general notice* as held in **Kenya Airways Limited versus Aviation & Allied Workers Union Case**. Such general notice thus goes to prepare the employees as a whole that there is likelihood of their work being changed or reviewed or that some positions will no longer exist affecting the employment of some of them. Such notice mentally and psychologically sets the employees ready. This was the holding of the Court in the case of **Jane Khalechi versus Oxford university Press E. A. ltd [2012] eKLR** thus;

... the notices under section 40 is different from the notice as under section 41, the notices envisaged under a redundancy process is that once an employer has reviewed their business situation and realised that there is need to restructure and or reorganise for more productivity, there must be notification to the employees, whether they will be affected or not. This process does not just suddenly happen where an employer open their doors in the morning and realise they have to reorganise for better productivity or be more strategic in running their business at the close of day

15. Even where the employer has gone through the motions of assessing their business and made a decision that a redundancy should take motion, there is a fundamental process that must be addressed. The Labour Officer responsible for the areas where the employer is situate must be informed so as to facilitate the legal compliance. This is well articulated and outlined in the case of **David matevu & 103 Others versus Africa Nazarene University, Cause No.2286 of 2012** thus;

.... Employment is very personal and the loss of it can be traumatic if not handled well. Since a redundancy is not due to the fault of any of the parties to the employment relationship, parties are encouraged to engage in consultations and thus the need to involve the Labour Officer not as a point of sharing information but as s source or reference to guide on the entire process. This is a public officer, well acquainted with the necessary provisions in labour relations and employers should gladly utilise the Labour Officers expertise to avoid missing out on the practical details that go with the redundancy process.

16. In this case, the Respondent admits that on 28th December 2012, they issued the Claimant with a termination notice. He was also advised to collect his dues on 31st December 2012. This is not the procedure envisaged under section 40 of the Employment Act. There is a general notice that should go to all employees followed by a personal notice of not less than one month to the affected employee. The notice thus issued to the Claimant is invalid and unlawful. It must be indeed caused him trauma and affected him psychologically as he testified in court. This an unfair labour practice and no employee should be put into such circumstances as it is not their fault the employer is faced with a redundancy situation. The respondent's Witness did not state when the decision to lay off staff was taken and by who. It is also not clear why sales were going down and there is no relationship set out as to how the layoff of the Claimant was necessary. No other employees seem to have been affected by such lay off as no evidence was led to this end. To therefore single out the Claimant and terminated him under the guise of a redundancy is contrary to article 41 of the constitution that guarantee the right to fair labour practices. Compensation is therefore due with regard to the finding of unfair termination.

Remedies

17. Compensation is due upon the finding of unfair termination. The Claimant is awarded 6 months gross pay.

18. The Claimant is seeking Notice pay. Such notice is due in this case on the basis that before the Claimant was terminated he ought to have been notified. Such notice is not as under section 35 of the Employment Act, the notice must comply with the provisions of section 40 of the Act. To simply say that an employer will pay in lieu of issuing notice is wrong. A redundancy notice is due even where the employer intends to make a payment. This shall be paid at Kshs.11, 445.00 being the gross monthly wage per the last pay slip structure issued to the claimant.

19. Salary due for November and December 2012 is claimant. The Claimant has attached a pay slip for November 2012 stating the amounts due and the deductions made. The Claimant failed to clarify as to why he is seeking for pay for November 2012 as well as the pay due for December 2012 whereas he has a pay slip indicating such pay for November 2012 was remitted and paid through Fina Bank account No.122 5005 194. In view of the above, only the salary for December 2012 is due at Kshs.11, 445.00.

20. Unpaid leave is claimed. The Claimant did not outline as to how this arose. It shall not be awarded.

21. Severance pay is due in a case of redundancy. Where not agreed, a sum of 15 days wage for each full year worked is due. The Claimant only states that he was employed in 2010. The month or dates are not stated. The Respondent is in law the legal custodian of all work records per section 73 and 74 of the Employment Act. Such work contracts or dates of the claimant's employment should be submitted by the employer. In the absence of such records I take it that the Claimant served for the whole of 2010, 2011 and was terminated end of 2012 and thus entitled to 15 days work for the 3 years all at Kshs.17, 167.50.

22. Any award made to the Claimant herein is lawfully subject to the provisions of section 49(2) of the Employment Act;

(2) Any payments made by the employer under this section shall be subject to statutory deductions.

22. Statutory dues applicable herein shall be deducted. Such dues should not go to the Claimant but to the relevant agency for purposes of the employer complying with section 49 of the Employment Act and any other written law. This is not a justification as for the Claimant to refuse to accept his terminal dues. To reject the same on the grounds that NSSF and NHIF should not be deducted is illegal as the employer is required to make such deductions. Had the Claimant received such dues, his claims herein could have reduced. Costs shall only be awarded at 50%.

Judgement is therefore entered for the Claimant in the following terms;

- a) A declaration that the termination of the Claimant was unfair;**
- b) Compensation awarded at Kshs.68, 670.00;**
- c) Notice pay at Kshs.11, 445.00;**
- d) Severance pay at Kssh.17, 167.50;**
- e) Salary for December 2012 is awarded at Kshs.11, 445.00; and**
- f) Costs of the case at 50% awarded to the claimant.**

Delivered, dated and signed in open Court at Nairobi this 21st Day of November 2015.

M. Mbaru

JUDGE

In the presence of:

Court Assistant.....

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