



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**  
**CAUSE NO.2096 OF 2014**

**DANIEL JUMA .....CLAIMANT**

**VERSUS**

**BOB MORGAN SERVICES LIMITED ..... RESPONDENT**

**JUDGEMENT**

1. The issues in dispute is the unlawful and unfair dismissal from employment, the non-payment of terminal dues and compensatory damages.

2. The claim is that the Claimant was employed by the Respondent from August 2001 as a Security Guard and working from 6am to 6pm daily for 6 days per week. The Claimant was paid Kshs.18, 558.00 per month and continued to work diligently until 2<sup>nd</sup> November 2013 when dismissed. that on this day, while the Claimant was at Fedha Plaza, Westlands where he was situate and working, guards from G4 Security Company were brought to replace him and the client management told him he had no authority to be at their premises. The Claimant was then directed to the respondent's head office. The Claimant was not allocated any duties and only received Kshs.22, 701.00 as his terminal dues; made to sign a discharge voucher; and on 5<sup>th</sup> November 2013 he was issued with a termination letter.

3. The claim is also that the Claimant was dismissed form employment for no cause and contrary to procedure and the law. That there was nothing that he had done to warrant a dismissal and no notice had been issued. The Claimant is therefore seeking notice pay; gratuity; loss of income; and compensation.

4. In evidence, the Claimant testified that upon employment by the respondent, he was posted to various sites and his last such place was at Fedha Plaza. On 1<sup>st</sup> November 2013 his supervisor Mr Sang came and told him that the respondent's assignment had lapsed as a new security company had been given the work. On 2<sup>nd</sup> November 2013 they were told to go to the office and return their uniforms. They were made to sign blank papers and issued with termination letter and told that the contract between the Respondent and the company where they had been working had ended. There was no prior notice or good reason given as to the termination.

5. In cross-examination, the Claimant admitted that he was paid terminal dues that included notice pay but not everything was paid. He suffered loss and damage due to the abrupt nature of the termination of employment. His family suffered immensely since he had not been given prior notice.

**Defence**

6. In defence, the Respondent admit that they had employed the Claimant from 9<sup>th</sup> August 2001 until 30<sup>th</sup> October 2013. The Claimant was placed at a client's site at Fedha plaza when on 3<sup>rd</sup> October 2013

the Claimant issued notice of intention to terminate contract for guard services. As a result on 4<sup>th</sup> November 2013 the Respondent called all the guards from this site and were informed of impending termination and that the Respondent was unable to redeploy them to other assignments and the only option was to terminate their services. On 5<sup>th</sup> November 2013 were issued with letters of termination and there was clearance and payment of terminal dues.

7. The defence is also that the reasons for terminating the Claimant were beyond their control and these factors were explained to the claimant. All owing dues were settled immediately and notice was paid in cash. Nothing is owing as the Claimant has since signed a discharge and clearance forms with the respondent.

8. In evidence, the Respondent called Dennis Michaka orina the Quality Assurance and Administration Manager. He testified that he worked with the Claimant but the Respondent was forced to terminate his services as a security guard. The Respondent had a contract with Fedha Management which was terminated in November 2013. The Respondent got a one month notice before the contract was terminated after a long relationship with the client and they commenced negotiations to avoid the termination. On 1<sup>st</sup> November 2013 the client called and directed the Respondent to remove its guards from their premises. The Respondent had thus to withdraw their guards but had no other work to redeploy them and hence were forced to issue termination letter. Notice was paid for one month and all other dues owing. There was no other site in need of guards and since the Claimant had not done anything wrong, he was paid his terminal dues.

### **Submissions**

9. In submissions the Claimant stated that this was a case of redundancy that failed to meet the legal requirements. Section 40(1) (a) of the Employment Act sets out mandatory requirements for a redundancy which the Respondent failed to follow. That in the Respondent laying off the Claimant there was discrimination against them as held in **Hezbon Waigi versus Equatorial Commercial Bank Ltd [2013] eKLR**. The Respondent as a security company has various clients with whom they should have placed the Claimant but failed to do so. The Claimant should therefore be paid his claim with costs.

10. The Respondent on their part submitted that they lost a contract with a client that affected the employment of the claimant. The Claimant was given the reason for his termination and all terminal dues were paid and nothing is owing. That the Respondent complied with the provisions of section 41 of the Employment Act where the Claimant was given a hearing before he was terminated. That the dues claimed should be dismissed as notice pay was acknowledged and no compensation is due as the reason for termination was valid and fair. The Respondent complied with section 47(5) of the Employment Act as the reason for termination was justified. That where the Court finds that the termination was unprocedural, the Court should award compensation at 4 months as held in **Elizabeth Ngina versus East Africa Safari Air Express Ltd [2013] eKLR**.

### **Determination**

Whether there was unfair dismissal;

Whether there was due process;

Whether the Claimant is entitled to compensatory damages.

11. The termination letter issued to the Claimant by the Respondent and dated 5<sup>th</sup> November 2013 States as follows;

*Termination of service*

*Following the termination of the contract by the client, your services with Bob Morgan Services*

have been terminated with effect from 4<sup>th</sup> November 2013 in accordance with the Employment Act 2007, Laws of Kenya.

...

12. Therefore, the reason for termination is that clear. This did not have to do with any misconduct, rather, a client of the respondent, terminated a contract that resulted into the loss of employment. Such therefore had nothing to do with the claimant. This was not within the control of the claimant. Such was not foreseen or known to the claimant. The events taking place between the Respondent and a third party were not within the knowledge of the Claimant but he is the one who suffered loss of employment.

13. The scenario therefore set out in the letter of termination is what is contemplated under section 40 of the Employment Act – redundancy. The loss of work or employment by involuntary means through no fault of an employee and initiated by the employer as well defined under section 2 of the Employment Act. In such a case, upon the knowledge by the employer that there is the likelihood of loss of employment, notice is supposed to issue as held in **KUDHEIHA versus Aga Khan University Nairobi, Cause No.815 of 2015;**

*A redundancy must be initiated by the employer through abolition of an office, job or occupation which may lead into the loss of employment. As such, to arrive at which office, job or occupation is to be abolished, the employer must undertake an assessment, hold consultations so as to arrive at the ultimate decision as to whether it should be abolition of office, job, occupation and loss of employment. This is not a one-day event.*

14. This position is given emphasis in the case of **Kenya Plantation & Agricultural Workers union versus James Finley (K) Limited [2013] eKLR**. The Court held that;

*An employer would be entitled to undertake redundancy just like that employer would be entitled to undertake the other human resource functions like recruitment and selection, appointment and promotion, training and development and termination of the contract of service including dismissal on disciplinary grounds.*

15. The position is also given further weight by the Court of Appeal in **Kenya Airways Limited versus Aviation and Allied & Allied Workers Union Kenya & 3 Others [2014] eKLR**. Where there is loss of work, the employer must issue a general notice to all its employees and when there is certainty that certain positions are affected and the subject employees will be laid off, then a specific/personal notice to the employee must be issued.

16. The Respondent witness Mr orina was very casual about the reasons as to why the Claimant was laid off. Where indeed the Respondent lost a contract with their client at Fedha plaza, notice was given and despite their being negotiations between the Respondent and the client, the Respondent owed its employees affected the duty to issue notices as well. The alleged client and ongoing negotiations to restore the contract or how the process was addressed so as to arrive at laying off the Claimant is not addressed at all.

17. Lose of work due to redundancy is a matter taken seriously by the Parliament and this court. Parliament passed the Employment Act to address such a situation and particularly section 40, with the single purpose – how a redundancy should be addressed. This is intended to avoid a sudden loss of employment in a situation that would otherwise be better managed.

18. Where there is therefore loss of work due to the same being no longer available, the employer has a duty to assess the business situation and give notice in advance. Such a matter must first be reported to the Labour Officer and the employees given notice in advance. It is not sufficient that an employer is willing and or able to pay for notice. To the contrary. The notice contemplated under loss of work due to no fault of the employee is not a casual matter. Such an employee unlike in a case of misconduct must be prepared adequately in advance. This is not an ordinary termination as there must exist a business issue

that results in loss of work. To therefore pay for notice and seat back satisfied that the employer had done their duty is a misapplication of the law governing such a situation.

19. This Court has equally set ample jurisprudence on the subject of redundancy. As was submitted by the Claimant in their submissions and in the case of **Hezbon Ngaruiya Waigi versus Equatorial Commercial bank**. No employee should be terminated from his employment without the employer adhering to the mandatory provisions of the law. To do so is tantamount to engaging in unfair labour practice contrary to article 41 of the Constitution. This position is given emphasis in the case of **Jane Khalechi versus Oxford University Press EA Limited [20120] eklr**;

*... an employer shall not be allowed to simply cite re-organisation as a sufficient reason to lay off an employee, due process demands that consultations be inclusive and documented. Otherwise, there will be nothing to refer back to as to how the decision to lay off staff was arrived at.*

20. With that set out, the claim is couched in a manner that this was an ordinary termination as the issue in dispute as set out is that of unfair dismissal. Only at the submissions stage does the Claimant set out the issue of redundancy. There is no prayer at all in this regard. The claims set out in the memorandum are for compensation for unfair dismissal and the abrupt loss of employment. The Respondent too is fixated on the provisions of section 41 of the Employment Act and states that the Claimant was given a hearing before his termination. Far from it. This was not a case of misconduct as the layoff of the Claimant had nothing to do with a disciplinary matter. The matters set out under the letter of termination relate to what amounts to a redundancy.

21. I therefore find no effort whatsoever that the Respondent addressed the legal requirements under section 40 of the Employment Act. Whether pleaded or not, this being a Court of justice, and the Claimant being based on unfair dismissal of employment, to lay off and employee without following due process or following the legal requirements set out in law it to effectively dismiss and employee unfairly. Such a dismissal where effected for the reasons of redundancy and due process is not followed and the mandatory requirements are not adhered to, then this is to defeat the purpose of the law that this Court must protect. In such case, the claiming was unfairly dismissed for no due cause.

## **Remedies**

22. The Claimant admitted that he was paid notice pay. This is marked as settled.

23. The Claimant also admitted that he was a member of the NSSF and his dues were thus remitted by the respondent. The pay slip attached to the claim is evidence that indeed there was a deduction of NSSF and NHIF and thus under section 35(5) and read together with (6), service pay is not due. The claim is declined.

24. The Claimant is seeking damages for unlawful dismissal that caused him trauma and inability to meet his obligations. Upon the finding that the Claimant was unfairly dismissed and due process was not followed, the claim being based on unfair dismissal and not for redundancy, such unfair loss of employment shall be compensated by an award of 6 months gross pay. The Claimant is hereby awarded kshs.109, 500.00.

25. The Claimant was issued with his letter of termination dated 5th November 2013. There is salary due until the date of termination all amounting to Kshs.3, 042.00. This is awarded.

25. The Claimant is also awarded costs of the suit.

**Judgement is hereby entered for the Claimant for kshs.109, 500.00 as compensation; Kshs.3, 042.00 for 5 days worked in November 2013; and costs of the suit.**

**Orders accordingly.**

Delivered in open Court at Nairobi this 4<sup>th</sup> day of February 2016.

**M. Mbaru**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant

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