



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 611 OF 2014

DAVID MUTHUI NDUNGU

CLAIMANT

v

RILEY FALCON SECURITY LTD

RESPONDENT

JUDGMENT

1. David Muthui Ndungu (Claimant) commenced legal proceedings against Riley Falcon Security Ltd (Respondent) on 21 November 2014 and he stated the issue in dispute as *unfair termination/termination on account of redundancy*.
2. The Respondent filed a Response on 30 January 2015 and this prompted the Claimant to file a Reply to Response on 17 February 2015. The Cause was heard on 8 December 2015 when the Claimant testified.
3. The Respondent opted to close its case without calling any witnesses. The Respondent filed its submissions on 18 February 2016, while the Claimant's submissions were not on file by this morning.
4. The Court has considered the pleadings, testimony and submissions and identified the issues for determination as, *legal burden in unfair termination of employment disputes, whether the Claimant was employed by the Respondent, whether the Claimant was declared redundant, whether the redundancy was fair and appropriate remedies*.

Legal burden

5. The Court has been confronted with the question of legal and evidential burden in disputes concerning unfair termination of employment.
6. The Respondent herein in its submissions urged that the Claimant had failed to prove his case on a balance of probabilities and cited the holding by Mugo J (as she was then) in *Stephen Wasike Waku & Ar v Security Express Ltd* (2006) eKLR that a party seeking justice must place before the court all material evidence, and facts which considered in light of the law would enable the court to arrive at a decision as to whether the relief sought is available.
7. In my view, that legal principle is generally true, however there are exceptions, and in the case of disputes concerning fairness of termination of employment, the exceptions arise as a matter of statutory application.
8. I say so because the primary source of the legal and evidential burden placed upon employees and employers in unfair termination of employment disputes is the Employment Act, 2007 and not the Evidence Act or the general rules of evidence.

9. In a sense, the Employment Act, 2007 appears to be a complete code and the initial burden upon employees and employers is located in section 47(5) of the Employment Act, 2007.

10. Once the section 47(5) test is passed, then the employer has to discharge the statutory burden contemplated by section 43 of the Act (prove the reasons for termination), section 45 (that the reasons for termination are valid and fair) and section 10(3) of the Act (entitlements due to the employee).

11. As to proof of an employment relationship, the responsibility to cause a written contract to be issued is upon the employer and where none was issued, the oral testimony of an employee would be sufficient in terms of section 10(7) of the Employment Act, 2007.

12. Further, ordinarily, it is the duty of an employer to keep employment records and produce the same in Court. No employee would keep records as to overtime and the like.

Whether Claimant was an employee of the Respondent

13. The Claimant testified that he was employed by the Respondent on 24 December 2006 as a security guard but he was not issued with a written contract.

14. He produced a job identification card embossed with the name of the Respondent and pay slips with the name RFSSL-Kisumu.

15. The law both in 2006 and currently contemplate oral contracts and with the Claimant's testimony remaining unchallenged/uncontroverted and considering section 10(7) of the Employment Act, 2007, the Court finds that he has proved on a balance of probabilities that he was an employee of the Respondent.

16. In this regard, the initial *RFSSL* is instructive and suggests the initials refer to Riley Falcon Security Services Ltd-Kisumu.

Whether Claimant was declared redundant

17. The Claimant's testimony that he was informed that his services were no longer required on 30 April 2014 because the Respondent's contract with OrPower Inc. also remain unchallenged/uncontroverted.

18. The Court therefore has no hesitation in finding that the separation was not on account of any *misconduct, poor performance or physical incapacity* on the part of the Claimant.

19. It was involuntary and therefore falls within the category recognised by the law as redundancy.

Whether the termination through redundancy was unfair

20. Section 40 of the Employment Act, 2007 places the fulfilment of certain conditions/obligations upon an employer considering terminating the services of an employee on account of redundancy.

21. The conditions include notifying the employee and the local Labour Officer in writing, at least one month in advance, payment of outstanding dues and selection criteria. Where an employee is a member of a union, the union should also be notified.

22. There was no suggestion that the Respondent complied with any of the conditions and in this respect, the action of the Respondent was devoid of procedural fairness and hence procedurally unfair.

23. Further, it is incumbent upon an employer to demonstrate that termination through redundancy was necessitated by operational requirements in terms of section 45(2)(b)(ii) of the Employment Act, 2007.

24. The Respondent did not lead any evidence to discharge the burden and the Court reaches the conclusion, its action was substantively unfair.

Appropriate remedies

1 month pay in lieu of notice

25. Since the Respondent failed to comply with the terms of sections 35 and 40 of the Employment Act, 2007, the Claimant is entitled to 1 month pay in lieu of notice.

Earned wages

26. In terms of sections 18(4) And 49(1)(b) of the Employment Act, 2007, the Claimant is entitled as of right to wages for April 2014.

Travelling allowance

27. No contractual or statutory basis for this head of claim was demonstrated and it is declined.

Earned leave

28. The Claimant is entitled as of right to at least 21 days annual leave with full pay. His testimony as regards accrued leave was not challenged or controverted and the Court finds in his favour.

Salary deduction September/October 2013

29. No evidence was led on this item and it is declined.

Uniform refunds

30. The testimony on refund of uniform allowance was not challenged and the Court finds merit on the head of claim.

House allowance

31. The pay slips produced by the Claimant indicate that he was earning house allowance and therefore this head of claim is not legally tenable.

Overtime

32. The Respondent did not produce any employment records and in light of the unchallenged testimony, the Court finds for the Claimant.

Severance pay

33. Severance pay is a statutory requirement in cases of redundancy and in terms of section 40(?) of the Employment Act, 2007, the Court rules in favour of the Claimant.

Compensation

34. With the conclusion that the Respondent did not comply with the conditions outlined in section 40 of the Employment Act, 2007 or demonstrate that the redundancy was justified on account of operational requirements and considering the length of service, the Court is of the view that 12 months gross wages as compensation would be fair and appropriate.

Conclusion and Orders

35. The Court finds and holds that the services of the Claimant was terminate unfairly on account of redundancy and awards him and orders the Respondent to pay him

(a) 1 month pay in lieu of notice	Kshs 6,905/-
(b) April 2014 wages	Kshs 1,323/-
(c) Leave	Kshs 44,942/-
(d) Uniform deductions	Kshs 7,140/-
(e) Overtime	Kshs 7,840/-
(f) Severance pay	Kshs 27,790/-
(g) Compensation	Kshs 95,280/-
TOTAL	Kshs 191,220/-

36. A Certificate of Service is a statutory right and the Respondent should issue one to the Claimant within 7 days.

37. Claimant is denied costs for having failed to file submissions as agreed.

Delivered, dated and signed in Nakuru on this 3rd day of May 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Ngamate instructed by Muthanwa & Co. Advocates

For Respondent Ms. Alinaitwe instructed by Otieno Ragot & Co. Advocates

Court Assistant Mwangi S.