



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA

Cause Number 307 Of 2013

BETWEEN

STEPHEN MULAKI KIMEI
CLAIMANT

VERSUS

LOCHAB TRANSPORT LTD..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Muenzi Advocate instructed Stephen Oddiaga & Company Advocates for the Claimant

Mr. Chamwada Advocate instructed by Mogaka Omwenga & Mabeya Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed his Statement of Claim on the 20th September 2013. He states he was employed by the Respondent for 14 years, in the position of an Office Clerk. His contract of employment was terminated by the Respondent, on the 12th May 2013. He was told his services were no longer required.
2. He claims termination was unfair and unlawful. He was not paid his rightful dues. He seeks the following orders against the Respondent.
 - a. Accrued leave days at Kshs. 93,935
 - b. Severance allowance at Kshs. 115,612
 - c. Service for the years worked at Kshs. 134,400
 - d. 1 month's salary in lieu of notice at Kshs. 16,000

Total.....Kshs. 375,947

- e. Alternatively the Respondent to pay Claimant's statutory salary, dues pending, and/or damages for

- wrongful termination.
- f. Costs and interest.

3. The Respondent filed its Statement of Response on the 27th February 2014. It states the Claimant was employed from 1st March 2000 to 12th May 2013, when the Respondent terminated the Claimant's contract. Termination followed a fair procedure and was justifiable. The Claimant was given sufficient termination notice. The Respondent states at paragraph 5 of the Response that the Claimant is entitled to 12 days' salary for the month of May 2013, and to 10 days of annual leave. The Respondent explains that the Claimant was unable to perform his duties in accordance with the contract dated 1st March 2000. The Respondent urges the Court to dismiss the Claim, with costs to the Respondent.

4. In his Amended Claim filed on 3rd August 2015, the Claimant foregoes the alternative prayer 2(e), paragraph 2 of this Award. He similarly leaves out the prayer for damages for wrongful termination. The new prayers are:-

- a. 12 months' salary in compensation for unfair termination at Kshs. 192,000, (bringing the total monetary claim to kshs. 567,947)
- b. The Respondent to remit the sum of Kshs. 9,600 being N.S.S.F. contributions for the period between 2000 – 2003.

5. Parties agreed on 8th December 2015, to have the dispute considered, and determined on the basis of their Pleadings, Documents and Submissions. The Claimant confirmed the filing of his submissions at the last mention in Court, on the 17 February 2016. The Respondent opted to skip the mention, and the file does not show any Closing Submissions filed by the Respondent.

Claimant's Submissions

6. He was employed by the Respondent on 1st March 2000, as shown in the letter of employment. He was issued Staff Identity Card. He was designated Office Clerk.

7. He received a letter from the Respondent dated 12th April 2013, informing him the Company was undergoing restructuring. His services were terminated as a result, effective 12th May 2013.

8. His dues were tabulated by the Respondent to comprise 12 days' salary for May 2013, and 10 days of annual leave, at kshs. 13,539. He was offered nothing else, after 14 years of service.

9. In addition to the explanation revolving around restructuring, the Respondent alleged the Claimant was unable to perform his duties. There were warning letters allegedly issued to the Claimant. These letters were not received or known to the Claimant.

10. The Claimant submits his position was declared redundant. The Respondent did not, in declaring redundancy, follow the law under Section 40 of the Employment Act. Notice was not copied to the Labour Officer. No severance pay, at a rate of not less 15 days' salary for every year completed in service, was paid to the Claimant. The Claimant submits he is entitled to severance pay and service pay. Termination did not follow a fair procedure, and the Claimant urges the Court to find he deserves compensation.

Respondent's Position

11. The Respondent, as noted above, appears not to have filed its closing Submissions. Its case must therefore be considered solely on its Pleadings and Bundle of Documents.

12. Various reasons are given by the Respondent on its decision to sever its employment relationship with the Claimant. It is alleged several warning letters had been issued the Claimant. Secondly, it is said the Claimant was unable to perform his duties, in accordance with the contract given to him in 2000. Lastly,

the Respondent explained in the letter dated 12th April 2013 that Company was restructuring, and the Claimants' services would not be needed, effective from 12th May 2013. Termination was fair.

The Court Finds:-

13. In issue is whether termination was based on valid reason; whether it was fairly carried out; and whether the Claimant merits the Award sought.

14. Section 41, 43 and 45 of the Employment Act 2007 require termination of employment meets the standard of fairness set under the Act. Termination must be shown to be based on valid grounds. If termination is on the ground of redundancy, it must follow the procedural and the substantive standards created under Section 40 of the Act.

15. The letters of warning issued to the Claimant by the Respondent dated as far back as 1st April 2000, just one month after employment. They continued to be written up to December 2012. There are many such letters exhibited by the Respondent.

16. The warning letters do not seem to be related to each other. They are on diverse complaints by the Employer against the Employee. Each letter expired at a certain point. Many are characterized as 'Final Warning'. There was no action following these final warnings, and the presumption would be the complaints against the Employee were resolved at their own time.

17. Importantly, there is no relationship between the warning letters, the poor performance and the restructuring. The latter was the reason for termination, rendering all others irrelevant. As termination was for operational reasons, and not based on any reasons caused by the Claimant, it ought to have been treated as a case of redundancy, and the Employer applied Section 40 of the Employment Act in full. It was termination at no-fault-of the Employee, allegations about his poor performance being diversionary.

18. There is nothing to suggest the Respondent considered Section 40 of the Act. The Employees' redundancy package was reduced to 12 days' salary, and 10 days of annual leave – amounting to a paltry Kshs. 13,539 – after 14 years of service.

19. The Court is satisfied the Claimant is entitled to severance pay at 15 day's salary for 14 years completed in service at Kshs. 129,230 – (Kshs. 16,000/26 working days x 15 x 14).

20. Section 40 of the Act also requires any pending annual leave pay is paid off. The Claimant was not able to show the Court what the figure of Kshs. 93,935, claimed as pending annual leave represents. He does not ascribe any number of days to the figure. There were a number of Leave Forms, where the Claimant is shown to have received money in lieu of leave, or taken leave. The Forms do not show previous leave record. If there were days owed, the Claimant should have insisted these are captured on the Leave Forms, before he appended his signatures. There is no sufficient material to justify the Claim for Kshs. 93,935 in leave pay.

21. The Claim for unremitted N.S.S.F deductions was not supported by any material, and is similarly declined.

22. Was termination fair? In part, this is answered in paragraphs 15 – 18 above. There was no valid ground underlying termination. Even the generalized restructuring, was not detailed in the letter of termination. Section 40 was completely disregarded. No reason is given why the Claimant's position was selected for redundancy. Requisite notices did not issue to the Ministry of Labour. Section 40 requires the Employer "*shall not terminate a contract of service on account of redundancy*" unless the Employer complies with the conditions set thereunder. Among these conditions are – the Employer has paid off leave in cash; the Employer has paid not less than 1 month's salary in lieu of notice' and the Employer has paid severance pay, at the rate of not less than 15 days' salary for each completed year of service. The key word is '**has**'. Redundancy dues must be paid before termination of the contract of service. If not paid, termination falls in the category of unfair actions, which are compensable.

23. The Court is convinced termination was unfair and grants compensation at 10 months' salary amounting to Kshs. 160,000/=.

24. The law does not contemplate severance pay is paid together with service pay. Severance pay is under Section 40 of the Act, while service pay is under Section 35(1). The two laws, while aimed at recognizing and rewarding years of service, are different regimes. They belong to the sphere of social security law, which does not intend double social security payment for Employees leaving employment. One form of social security is deemed sufficient, consideration being also, in the ability of Employers to sustain disproportionate social security benefits. The Claim for service pay is rejected.

25. Notice pay of 1 month in lieu of notice has adequate support in law, and is allowed at Kshs. 16,000/=.

IN SUM, IT IS ORDERED:-

- a. *Termination was unfair.*
- b. *The Respondent shall pay to the Claimant 10 months' salary in compensation at Kshs. 160,000/=.*
- c. *The Respondent shall pay to the Claimant severance pay at Kshs. 129,230 and notice pay at Kshs. 16,000.*
- d. *The total sum of Kshs. 305,230 shall be paid to the Claimant by the Respondent within 30 days of delivery of this Award.*
- e. *Costs to the Claimant.*
- f. *The Principal amount to attract interest at 14% per annum from the end of 30 days given under (d) above.*

Dated and delivered at Mombasa this 27th day of June, 2016

James Rika

Judge