



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1872 OF 2014

ANTHONY MUTUKU MUSYOKI.....CLAIMANT

VERSUS

CROWN INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent his erstwhile employer. His claim filed on 22nd October 2014 sought resolution of a dispute he framed as non-payment of terminal benefits and damages for unlawful and or wrongful termination of employment. He averred that he was employed by the predecessor of the Respondent sometime in 2004 and was a paint mixer on casual basis at first and later, after several demands offered a contract of employment in 2011 as a machine attendant earning Kshs. 8,798/-. The Claimant averred that he was earning a total of Kshs. 14,026/- at the time of his dismissal. He stated that the Respondent adamantly neglected to pay his terminal dues and severance pay. He sought a declaration that the termination was unlawful and for payment of 12 months compensation as well as one month in lieu of notice, severance pay from 2004 till 2013, costs of the suit and any other relief the Honourable Court may deem fit and expedient to grant. In support of his claim, the Claimant filed a letter of offer of employment and, copies of salary vouchers and a copy a letter of termination of service. He also filed a witness statement contemporaneously with his claim.

2. The Respondent replied to the claim on 26th November 2014 and averred that the Claimant was employed by the Respondent on the 1st of April 2011 and not 2004 as alleged by the Claimant. It averred that the Claimant was not unlawfully terminated but was duly remunerated as per his letter of appointment and all dues due to him inclusive of service pay and notice pay in accordance with the relevant labour laws. It was averred that it was not liable to compensate the Claimant in the manner pleaded or at all. The Respondent thus sought the dismissal of the suit with costs. In support of its defence, the Respondent filed the letter of appointment, termination letter, a salary voucher, a copy of a cheque for 28,012/- and copy of a payslip. On 9th December 2015, the Respondent filed a witness statement by a Mr. James B. Mwangi.

3. The Claimant testified on 7th October 2015. He was led in his examination in chief by his counsel Mr. Amutallah. The Claimant stated that he was employed by the Respondent in 2004. He testified that he joined as a paint mixer and was paid Kshs. 264/- per day. He stated that he worked from 2004 till 2011 when he was employed as permanent staff in April. He said that he had been complaining a lot about being temporary and was employed as permanent in October 2011 and paid Kshs. 14,026/- a month. He was given the post of machine attendant and worked till August 2013 when he was given the letter of termination. He testified that he was given the termination letter dated 16th August 2013 and informed

that his employment was over. He stated that there was no basis for the termination as he had not been given any notice or warning. He said that he was not paid his compensation from 2004 till 2013. He stated that he was paid some dues but not all. He testified that he was paid Kshs. 28,012/-, salary for the month worked, notice pay for one month which was not in full and leave pay. He had worked for about 10 years and sought that the Court considers the claim and orders that he be paid his full terminal dues. He stated that he was not given the reason for his termination. He relied on all the documents in his pleadings as evidence in support of his case.

4. He was cross-examined by Mr. Otieno for the Respondent and testified that he was employed as a mixing attendant. He stated that he operated the machine that mixed paint. On being referred to the letter of appointment he testified that he was employed on the 1st of April 2011 as permanent. He testified that the letter of termination stated that the Respondent had acquired a new automatic mixing machine and that his services were not required. He stated that he was paid his salary for August 2013, one month notice pay of Kshs. 9,800/-. He said that his basic was Kshs. 9,800/- and that his notice pay was equivalent to his basic pay. He testified that he was paid service pay of Kshs. 9,800/- and he stated that it was not known whether it was service pay for one month or for the 10 years.

5. He was re-examined and testified that he joined the Respondent in 2004 and was given a letter of appointment on 1st April 2011. He was referred to the salary voucher and stated that his salary was 14,026/- and that he was paid Kshs. 9,800/- as notice and that service was indicated as Kshs. 9,800/-. He testified that he was paid service for 2013 and was not paid service pay for the other years. He stated that he was not given notice before termination.

6. The Respondent called Mr. James Mwangi who testified on 19th January 2016. He was led in his testimony by Mr. Mulandi and stated that he was the Human Resources Director of the Respondent for the past 2 years 3 months and did not know the Claimant but could glean from the records held by the Respondent. He testified that the records revealed that there was a conciliation meeting at the Ministry of Labour but the Claimant did not attend and twice they sat with the Union in the Claimant's absence. He testified that the conciliator sought to know of the payment made and sought that the employer makes an offer but before an offer could be taken to the Minister the matter was taken to Court. He stated that they disagreed because the Claimant said that he had worked for longer than was in the records. He could not recall the years exactly but the Claimant had stated he had worked for over 5 years. He stated that he joined the company in 2013 and did not write the termination letter but was the one who wrote the submissions to the Ministry of Labour. He testified that the Claimant was terminated on account of redundancy and paid the dues. He stated that the Claimant was a machine attendant and the Respondent bought a new machine that was loading itself so the Respondent did not need the Claimant's services. He testified that the Claimant earned 9,800/- plus 15% as house allowance. He stated that the Claimant was paid Kshs. 28,000/- which was 14 days per year for 2 years, notice and leave due. He said that it was 2 months severance pay, one month's salary and leave dues making a total of 33,000/- less statutory deductions bringing it to 28,000/-. He stated that he did not think there was anything else legally due as per the appointment letter since notice was paid, leave was paid, severance pay was made and the only disagreement was on length of service. He testified that the Claimant had only worked for 2 years since he had joined in April 2011. He stated there are no records produced by the Union at conciliation level to show anything else. He said that termination was fair and in accord with the law on redundancy and the employee paid in full.

7. In cross-examination by Mr. Amutallah, he testified that he had joined the Respondent on 8th October 2013 and that the Claimant had been terminated in September before he joined the Respondent. He stated that he had no record before 2011 and all he had was the letter of appointment. He testified that the payslip showed a gross pay of Kshs. 14,026/-. He stated that the Claimant was terminated on account of redundancy but did not think that the Claimant was notified personally. He testified that there is no letter informing the Labour Officer but there is an invitation letter from the Ministry. He offered to produce it later. He testified that there were 2 machine attendants – the Claimant and somebody else but he could not tell who was senior among the two. He stated that he was not the one who acting at the time and did not have the skills for the two.

8. The parties were to file submissions and the Claimant filed his submissions on 27th January 2016 and the Respondent filed its submissions on 12th February 2016. The Claimant submitted that he was employed by the Respondent predecessor in 2004 as a paint mixer and was employed in 2011 on a permanent basis as a machine attendant earning Kshs. 8,798/- a month. The Claimant submitted that he worked diligently without any incidents as shown by his service record. He submitted that the dismissal was wrongful, unfair and without any justifiable cause. He submitted that the procedure of his termination was not lawful or procedural. He submitted that the termination was contrary to Section 35 of the Employment Act which obligated the Respondent to issue a termination notice prior to terminating the services of the Claimant. The Claimant relied on the case of **Alex Bundi v Kakuzi Limited [2012] eKLR** where Odunga J. citing the Committee of Experts in an ILO publication “**Protection Against Unjustified Dismissal**” held that the purpose of notice is to mitigate the consequences of termination of employment and in particular to prevent the worker from abruptly being without a livelihood if the employer fails to observe the period of notice the worker must therefore be entitled in compensation. The Claimant also cited the Malawian case of **Mkandawire v World Vision International** Industrial Relations Court IRC 254 of 2005 which the Claimant called in aid in regard to Article 13 of ILO Convention No. 158 and the Court of Appeal case of **Barclays Bank of Kenya v Joseph Mwaura Njau [2006] eKLR** where Omollo, O’Kubasu, Githinji JJA restated the principles on notice period. The Claimant submitted that in accordance with Section 45 of the Employment Act the dismissal was unfair. The Claimant thus urged this Court to find in his favour and award the reliefs sought in his claim.

9. The Respondent on its part submitted that the issues for determination were whether the Claimant was unfairly terminated and whether the Claimant was entitled to terminal benefits as claimed in his claim. The Respondent submitted that redundancy is defined in Section 2 of the Labour Relations Act, no. 14 of 2007. It was submitted that Section 2 of the Employment Act 2007 provides for redundancy. The Respondent submitted that it would be in cases where it is involuntary and at the initiative of the employer and in cases where the employee is at fault and where the employee’s services are superfluous. The Respondent submitted that Section 40 of the Employment Act provide the conditions that the employer has to comply with before declaring an employee redundant. The Respondent cited Section 40(b) and submitted that the Claimant was personally notified and was even invited for a conciliation meeting with Ministry of Labour officials. The Respondent submitted that it had acquired a machine which was more efficient than the Claimant and that the Claimant did not attend the meetings called at the Ministry and therefore was not keen to solve the issues raised in the claim. The Respondent cited the Court of Appeal case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** where Maraga, Githinji, Murgor JJA held that a decision to declare a redundancy was an employer’s statutory right and the employer was entitled to terminate an employee’s contract of service as long as the employer genuinely believed that there was a redundancy situation. The Respondent submitted that the Employment Act Section 40(e), (f), (g) provides for payment in lieu of notice, paid leave in cash as well as severance pay. The Respondent submitted that the Claimant admitted that he was paid but said it was not enough. The Respondent submitted that the Claimant was paid and therefore could not benefit twice from what he had initially received. The Respondent submitted that the Claimant had not proved that he was not paid all the terminal dues and sought that the Court should find that the Claimant was paid all his terminal dues and therefore should uphold the termination as lawful and dismiss the suit with costs.

10. The suit involves the termination of the Claimant. It emerged through cross-exam of the Claimant and the testimony of the defence witness that the Claimant was actually declared redundant. The Respondent paid the Claimant Kshs. 28,012/- as terminal dues being pay for the days worked, notice pay, severance pay and leave dues. The Claimant asserts that is not enough and states that he was employed for a longer period than was acknowledged by the Respondent. He invoked ILO Conventions and cited 2 international labour standards in particular.

11. Article 2(5) of the Constitution provides that the general rules of international law shall form part of the law of Kenya and ILO Convention No. 158, Termination of Employment Convention 1982, which Kenya has not ratified, provides under Article 13 as follows:-

1. When the employer contemplates terminations for reasons of an economic, technological,

structural or similar nature, the employer shall:

(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

12. The Claimant also cited the Report of the Committee of Experts in **Protection Against Unjustified Dismissal** during the ILO's 82nd Session in 1995 which provides at paragraph 247 page 92 as follows:-

The purpose of the period of notice is to mitigate the consequences of termination of employment, and in particular to prevent the worker from abruptly being without a livelihood if the employer fails to observe the period of notice; the worker must therefore be entitled in compensation in lieu of notice.

Such compensation should correspond to the remuneration the worker would have received during the period of notice if it had been observed.

13. The Employment Act 2007 imports some of these principles encapsulated by the ILO Conventions and international labour standards that the law is replete with. In matters involving redundancy, the Employment Act 2007 makes provision in the definition Section and Section 40. Section 2 provides as follows:-

*“**redundancy**” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;*

14. Section 40 of the Employment Act 2007, provides as follows:-

40(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.

2. Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable

3. The Minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Minister

15. The law, as seen above under Section 40 places a burden upon the Respondent to avail the Court of the reasons for the dismissal and in particular the reasons for the declaration of the redundancy. Its best effort was the case it presented which was that the Claimant was entitled to only 2 years severance pay, notice, pay for days worked and no more. The decisions cited by both parties have been considered by the Court and of note was the decision by my brother Odunga J. in the case of **Bundi v Kakuzi** *supra*.

16. In the case of **Lucus Mzee Wamukota v Riley Falcon Security Ltd [2016] eKLR** Radido J. held as follows:-

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

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.

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.

17. The Respondent calculated the pay based on Kshs. 9,800/- a month. From the documents availed, the Claimant earned Kshs. 9,800/- plus 1,470/- as house allowance thus bringing his pay to Kshs. 11,270/- or thereabout per month. The Claimant occasionally earned overtime pay and thus his pay would oscillate to Kshs. 14,026/- due to overtime. He did not produce any documents or proof of employment prior to 1st April 2011 and therefore served the Respondent for only 2 years according to his evidence. He did not prove employment prior to 1st April 2011. That said, the Respondent did not terminate the Claimant's services in accordance with the law. The Claimant ought to have been notified prior to the letter of 16th August 2013 which terminated his services with **immediate effect**. There was no notification made to the Ministry of Labour as required by law. The failure to observe the dictates of the law by not notifying the Claimant at least one month in advance with copy to the Ministry of Labour was unprocedural and unfair to say the least. The Claimant therefore would be entitled to some recompense for the unlawful dismissal. In view of the fact that the Claimant was engaged for 2 years, the amount payable as severance would have been Kshs. 11,270/2*2 which is Kshs. 11,270/- to this would be added the one month notice pay of Kshs. 11,270/- and one month worked Kshs. 11,270/- and thereafter add the leave days earned and not taken (pro rata leave for 7 months) Kshs. 4,617/-. It is clear from this that the Respondent did not apply

the correct sum in the computation of the Claimant's dues thus arriving at an erroneous figure. The Claimant earned overtime as well in August 2013 being Kshs. 864.47/- which would be his entitlement. It was indicated that the Claimant owed Kshs. 3,872.53/- for being absent. In the Court's view, the sum paid as terminal dues was manifestly less than the Claimant was entitled to. In the final analysis, the Claimant is entitled to:-

- i. Notice pay balance of Kshs. 1,470/-
- ii. Severance balance of Kshs. 1,470/-
- iii. Compensation for unfair dismissal being 3 month's salary Kshs. 33,810/-
- iv. Costs of the suit
- v. Interest on the sums above at Court rates from the date of judgment till payment in full.

Orders accordingly.

Dated and delivered at Nairobi this 21st day of June 2016

Nzioki wa Makau

JUDGE