



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT

AT MOMBASA

CAUSE 892 OF 2015

JOHN OKOTH KUMBA.....CLAIMANT

VERSUS

HABO GROUP OF COMPANIES.....1ST RESPONDENT

AWANAD ENTERPRISES LTD.....2ND RESPONDENT

JUDGMENT

Introduction

1. This is a Claim for terminal dues plus compensation for unfair termination of the Claimant's employment by the Respondents on 20.4.2015. The grounds upon which the Suit stands are that the dismissal was not founded on a valid and fair reason and that the procedure followed was not fair.
2. The Respondent never filed any defence despite being served with summons and mention notice for directions. The Suit was disposed of by written submissions based on the pleadings, documents and witness statement filed.

Analysis and Determination

3. There is no dispute that the Claimant was employed by 2nd Respondent on 1.3.2014 as Security Manager and that he was given the letter of appointment dated 19.8.2014. His monthly salary was kshs. 60,000 and he was entitled to 21 days annual leave. The contract was terminable by one month notice by either party but if done by the employer, the employee would be entitled to severance pay at the rate of half month salary per year of service.
4. There is also no dispute that the Claimant's services were terminated by the letter dated 20.4.2015 signed by the HR Manager for the 1st Respondent. The issues for determination are:-

- a. Whether the termination of Claimants employment contract was unfair.
- b. Whether the reliefs sought should issue.

Unfair Termination

5. The Claimant contends that he applied for his annual leave on 4.4.2015 to the HR Manager Mr. Asuso

and he was given 14 days. That before he left he also alerted the respondent's CEO. That on 20.4.2015, he received a phone call from the proprietor of the company Hon. Awiti demanding to know his whereabouts. That after explaining that he was on leave with the permission of the HR Manager, Hon. Awiti dismissed him over the phone and told him that the HR Manager had no authority to give him annual leave.

6. On 21.4.2015, the Claimant went to see Hon. Awiti at his office at Syokimau but he refused to meet. The Claimant was thereafter served with the letter dated 20.4.2015 declaring his position redundant with effect from 20.4.2015.

7. After considering the letter dated 20.4.2015, I am satisfied that the termination of the Claimants services was through redundancy. The question that arises is whether or not fair procedure was followed as provided for under section 40 of the Employment Act [EA]. The said provision of the law requires that before declaring an employee redundant, the employer must serve at least 30 notice days in writing to the employee or his Union, and the Labour Officer. Thereafter, a fair selection of the staff to be laid off is done followed by payment of all the accrued benefits, salary in lieu of notice plus severance pay.

8. In this case, the termination was without any prior notice in writing to the Claimant and the Labour Officer. The procedure followed and the criteria used to select him for the layoff was not explained. That the timing of the redundancy is questionable especially coming the same date the proprietor complained to the Claimant about his leave. Having considered all the materials presented to the court by the Claimant and not contested by the Respondents, I find that the declaration of the Claimant's position redundant was done in violation of section 40 of the EA and therefore the termination of the Claimant's employment contract was unfair. The termination was also unjustified because the Respondent has not proved that the Claimant's position had indeed been rendered redundant by the alleged company restructuring.

Reliefs

9. Under section 49 (1) of the EA the Claimant is entitled to one month salary in lieu of notice, any accrued benefits under the employment contract plus compensation for unfair/unjust termination. He annexed a schedule of dues as tabulated by the Respondent in respect of Notice, Leave, severance pay and refund of Sacco contributions amounting to kshs. 137900 less statutory deduction. However, although the Claimant accepted the figure offered, the Respondent never paid. I will therefore proceed to award him his dues as below:-

Notice

10. The contract of employment provided for termination by one month notice but did not state what happens in default of the notice. However Section 35 and 36 of the EA provides for payment of salary in lieu of notice by the defaulting Party. Consequently, I award kshs. 60,000 to the Claimant as one month salary in lieu of notice. The sum awarded is based on clause 5.1 of the employment contract which provided that the gross pay for the Claimant's services was kshs.60000 per month.

Leave

11. The Claimant was entitled to 21 days annual leave. The employer offered 22 days pay in the tabulated dues and the Claimant accepted. I will award him the same being kshs.44000.

Severance Pay

12. Cause 2 of the letter of appointment provided for payment of severance pay to the Claimant if she terminated the contract. The rate provided for was half month salary per year of service. The Respondent tabulated the dues at kshs.30000 and the Claimant accepted. I award the same figure to him as agreed.

Compensation

13. The Claimant prayed for 12 months gross pay as compensation for the termination. I award him kshs.360,000 being 6 months gross salary despite the fact that he served for a short period of only one year. I have mainly considered the senior position the Claimant was serving and opined that he was not likely to secure an alternative within a period of less than 6 months. Lastly I have considered the fact that the Claimant did not contribute to his termination through misconduct.

Unpaid House Allowance

14. The Claim for House Allowance arrears is dismissed because as stated herein above the salary of kshs. 60000 was consolidated.

Unremitted NSSF

15. The NSSF Statement adduced proves that NSSF dues were not remitted from July 2013 – April 2014 when termination was done. Consequently, I award kshs.3600 as refund of unremitted NSSF dues for the 9 months between July 2013 and March 2014.

Certificate of Service

16. This is a right under section 51 of the EA and I direct that the Claimant be issued with a Certificate of Service as prayed.

Disposition

17. For the reasons stated above, I enter judgment for the Claimant against the Respondents in the sum of **kshs. 497,600** plus costs and interest.

Signed, Dated and Delivered at Mombasa this 29th day of July 2016.

ONESMUS MAKAU

JUDGE