



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 2043 OF 2014

DAVID KINYUA NTHUMBI.....1ST CLAIMANT
EMMANUEL NATO WAKHUNGU.....2ND CLAIMANT
VS
TRAVELLERS PETROL POINT LIMITED.....RESPONDENT

AWARD

Introduction

1. The Claimants' claim against the Respondent brought by a Statement of Claim dated 6th August 2014 and filed in Court on 17th November 2014 is for unlawful termination of employment and refusal to pay terminal benefits. The Respondent filed a Memorandum of Defence on 10th December 2014 and the matter proceeded to hearing with the 1st Claimant, David Kinyua Nthumbi testifying for the Claimants and Mary Njeri Moko for the Respondent.

The Claimants' Case

2. The 1st Claimant, David Kinyua Nthumbi was employed by the Respondent on 1st May 2010 initially as a Waiter and later as a Chef. The 2nd Claimant, Emmanuel Nato Wakhungu was employed on 1st January 2011 as a Waiter. He was later promoted to the position of Cashier.
3. The 1st Claimant worked for the Respondent until 2nd November 2013 and the 2nd Claimant worked until 31st October 2013 when their employment was terminated on account of redundancy. It is the Claimants' case that in terminating their employment, the Respondent did not follow the law.
4. The Claimants' respective claims are as follows:

1st Claimant-David Kinyua Nthumbi

- a. A declaration that the termination of his employment was unlawful and unfair
- b. One month's salary in lieu of notice.....Kshs. 11,800.00
- c. Leave pay for 2013.....10,892.30

- d. Service gratuity at 15 days for each completed year.....23,600.00
- e. Overtime (6 hours for 5 days a week.....362,800.00
- f. Severance pay.....23,600.00
- g. 12 months' salary in compensation for loss of employment.....141,600.00
- h. Certificate of service
- i. Costs plus interest

2nd Claimant-Emmanuel Nato Wakhungu

- a) A declaration that the termination of his employment was unlawful and unfair
- b) One month's salary in lieu of notice.....Kshs. 13,600.00
- c) Leave pay for 2013.....12,553.85
- d) Service gratuity at 15.....13,600.00
- e) Overtime (6 hours for 5 days a week.....346,545.00
- f) Severance pay.....13,600.00
- g) 12 months' salary in compensation for loss of employment.....163,200.00
- h) Certificate of service
- i) Costs plus interest

The Respondent's Case

5. In its Memorandum of Defence filed on 10th December 2014, the Respondent states that the Claimants were declared redundant when the management of the cafeteria where the Claimants worked was taken over from BP Shell Petroleum by Vivo Energy Company. The Respondent contends that the Claimants were duly notified of the takeover and were paid all their dues upon which they discharged the Respondent from any claims arising from the redundancy.
6. The Respondent further states that it had managed the cafeteria on behalf of BP Shell Petroleum and therefore had no control over the takeover by Vivo Energy.
7. The Respondent denies owing the Claimants any dues and states that overtime compensation and leave pay were paid on monthly basis as and when they accrued while severance pay and notice pay were paid on termination. The Respondent denies that the Claimants are entitled to gratuity or compensation.

Findings and Determination

8. The issues for determination in this action are as follows:
 - a. Whether the termination of the Claimants' employment was lawful and fair;
 - b. Whether the Claimants are entitled to the remedies sought.

The Termination

9. It is common cause that the Claimants' employment was terminated on account of redundancy. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy as:

“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.”

10. The law therefore recognises redundancy as a lawful form of termination of employment subject to the following conditions set out under Section 40 of the Employment Act:

- a. ***where the employee is a member of a trade union, the employer notifies the union of 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 the 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 an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.***

11. From the evidence laid before the Court the Claimants were paid severance, notice and leave pay thus satisfying conditions (e), (f) and (g). Further, since the entire business where the Claimants were employed was closed down, the Last In First Out (LIFO) condition under (d) was inapplicable.

12. It seems to me therefore that the only issue had to do with redundancy notice under conditions (a) and (b). It is now well settled in law that there are two notices in termination of employment on account of redundancy. The first notice informs both the employee and the Labour Office of an impending redundancy. The second is a termination notice which may be substituted by pay in lieu. The Respondent's Manager, Mary Njeri Moko admitted in cross examination that neither the Claimants nor the Labour Officer were issued with the redundancy notice.

13. There was no credible explanation for this omission yet the Respondent itself was notified of the takeover. By definition, redundancy happens at no fault of the employee and the conditions set out under Section 40 are aimed at providing such an employee with a soft landing. An employer who ignores any of the conditions must be held accountable.

14.As held by this Court in *Francis Maina Kamau V Lee Construction [2014] eKLR* where an employer declares a redundancy without observing the conditions set out under Section 40, the redundancy becomes an unfair termination within the meaning of Section 45 of the Act.

Remedies

15.Before determining the remedies available to the Claimants, I need to dispense with the issue of the effect of the final settlement vouchers executed by the Claimants discharging the Respondent from further claims. In addressing this issue in *Simon Muguku Gichigi V Taifa SACCO Limited [2012] eKLR* this Court stated as follows:

“An employer cannot...circumvent their obligation to an employee by producing a form of discharge executed by the employee. If the law is not followed, no form of discharge can cure the irregularity.”

16.I see no reason to change my mind and proceed to determine the Claimants' claim on that basis. In light of the Respondent's failure to issue the redundancy notice required under Section 40 (b) of the Employment Act, I find the termination of the Claimants' employment on account of redundancy procedurally unfair and award each of the Claimants three (3) months' salary in compensation.

17.In making this award I have taken into account the Claimants' length of service and the fact that apart from the redundancy notice, the Respondent complied with all the other conditions set out under Section 40 of the Employment Act.

18.From the final settlement vouchers produced by the Respondent, the Claimants were paid severance, notice and leave pay and these claims are therefore without basis and are dismissed. Additionally, the claim for service gratuity by the 1st Claimant was not proved and is also dismissed.

19.In response to the claims for overtime compensation, the Respondent produced extracts of Muster Roll showing that the Claimants were paid overtime earned on monthly basis. In the absence of any further evidence of unpaid overtime, these claims must fail.

20.Finally I make an award in favour of the Claimants in the following terms:

a) 1st Claimant-David Kinyua Nthumbi

3 months' salary in compensation for unfair termination.....Kshs 35,490

b) 2nd Claimant-Emmanuel Nato Wakhungu

3 months' salary in compensation for unfair termination.....Kshs. 44,385

21.The award amounts will attract interest at court rates from the date of the award until payment in full.

22.I further direct the Respondent to issue the Claimants with certificates of service.

23.The Claimants will have the costs of this case.

24.Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF JULY 2016

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JUDGE

Appearance:

Mr. Nyabena for the Claimants

Mr. Muturi for the Respondent