



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT

AT MOMBASA

CAUSE 69 OF 2015

(Consolidated With ELRC 71 OF 2015)

MARTIN KALAMA MWATZUMA

FRANKLINE NDA A TUNE.....CLAIMANTS

VERSUS

COASTAL QUARRY LIMITED..... RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought this Suit claiming damages for unfair termination of their services. The Respondent denies liability for the unfair dismissal and prays for the Suit to be dismissed.
2. The Suit was heard on 10.12.2005 when the Claimants testified as CW1 and CW2 respectively and the Respondent Mrs. Suresh Solanki as the defence witness RW1. Thereafter both Parties filed Written Submissions.

Claimant's Case

3. CW1, Martin Kalama Mwatsuma testified that he was employed by the Respondent on 26.2.2014 as a Security Guard. That his salary was kshs. 6270 per month and his working hours were between 6am to 6pm.
4. On 16.9.2014, he reported to work as usual and the Site Manager Mr. Bhavim told him that work had reduced and as such he would terminate his job as a security. He also gave him a letter dated 16.9.2014 for change of duty but CW1 declined the offer of another job. He then instructed his lawyer to serve demand letter and thereafter brought this Suit. He was not paid any terminal dues.
5. On cross examination CW1 contended that after being declared redundant, he was asked to apply for another job but when he declined the Respondent gave him a letter for change of duty for 4 months which he also declined. That the new job was for crushing stones.
6. CW1 confirmed that he was contributing to NHIF and NSSF and had worked for 6 months before his termination.

7. CW2, Frankline Ndaa Tune was employed by the Respondent in April 2010 as a Machine Operator earning kshs. 10000 per month.
8. On 30.9.2014, he reported to work and worked as usual until evening and after being paid his salary Mr. Bhavim Solanki, the Manager told him that work had reduced and as such he should take a rest until further notice.
9. CW2 was never called back and on 23.9.2014 he served a demand letter and thereafter brought this Suit. He prayed for service pay, salary in lieu of notice and compensation for the termination.
10. On cross-examination, cw1, admitted that he was paid the leave for 2013/2014 in September 2014. He maintained that he was not terminated for any wrong doing but because work had reduced.

Defence Case

11. RW1 is the owner of the Respondent. He confirmed that the Claimants herein were his employees working on permanent basis as security guard and Machine Operator respectively. That on 16.9.2014, the Respondent started to outsource security services and offered CW1 another job vide the letter for change of duty dated 16.9.2014. The new job for was crushing stones but CW1 declined and disappeared. RW1 denied ever dismissing CW1.
12. He denied that CW2 started working for the Respondent in 2010. He however admitted that the company had operational problems and paid her workers and closed down. That he paid CW1 his September 2014 salary of kshs. 10000 plus leave for 2013/2014 ksh 6500 plus salary in lieu of notice. That the company used to pay NHIF and NSSF for the claimants and as such they should not demand gratuity. He denied that the termination of the Claimants' employment was unfair.
13. On cross-examination RW1 confirmed that the Respondent's operation ended on 14.11.2014. He also confirmed that the letter for alternative job for CW1 was for only 4 months meaning that he was to work up to January 2014. He further confirmed that the new duties of crushing stone was not stated in the letter of change of duties but that it was communicated verbally. He further confirmed that the letter for change of duties was an offer which could be accepted or declined by the Claimant after which he would be paid his terminal dues. He contended that cw1 was paid his dues namely salary for August 2014 and disappeared. He further contended that the claimants used to go for their annual leave but produced no leave records.

Analysis and Determination

14. After considering the pleadings, evidence and submissions, there is no dispute that the Claimants were employed by the Respondent on permanent basis until September 2014 when their service were terminated due to reduction of work at the Respondent's quarry and also because the Respondent decided to outsource security services. The issues for determination are:-
 - a. Whether there was a valid and fair reason for the termination.
 - b. Whether fair procedure was followed before the termination.
 - c. Whether the termination was unfair.
 - d. Whether the reliefs sought ought to issue.

Reasons for Termination

15. The reason for terminating the cw1 according to rw1 was the decision to outsource security services while the cw2 was terminated due to reduction of work which led to the operations of the respondent's quarry being closed down in November 2014. The two reasons cited were valid and fair reasons for terminating the claimants through redundancy.

Procedure Followed

16. The procedure followed to terminate the services of CW1 was through an offer of an alternative job of crushing stones for a period of 4 months only. On the other hand the CW2 was terminated without notice but was paid salary in lieu of notice. In view of the fact the reasons for termination was redundancy of their respective positions of service, the procedure followed to terminate the claimants was unfair. The procedure followed was in contravention of section 40 of employment Act (EA) which prescribes the mandatory procedure for declaring employees redundant.
17. Section 40 of the EA provides that before declaring an employee redundant, the employer must serve at least one month's notice in writing to the employee or his Union and also on the Labour Officer. Secondly, the selection of the employees for the layoff must be done fairly and thereafter the employer must pay to the victims all their accrued employment dues plus severance pay. The employer never followed the said statutory procedure.

Unfair Termination

18. Termination of Employment is unfair if the employer fails to prove that it was founded on a valid and fair procedure and that it was done after following a fair procedure. As found herein above, the reasons for the termination of the claimants employing was valid and fair but the procedure followed was in breach of mandatory statutory provisions. The default to comply with the strict procedure provided under section 40 of the EA therefore rendered the termination unfair.

Reliefs

19. In view of the finding above that the termination of the Claimants' employment was in violation of statutory procedure provided under Section 40 of the EA, the same is declared to be unlawful.

Damages

Compensation

20. Both Claimants are awarded 6 months salary as compensation for unfair termination. The reasons for the award is that the claimant never contributed to their termination through misconduct. In addition the Court has considered the fact that the two could secure alternative employment within the 6 months either in the same remote area or elsewhere.

Notice

21. The Claimant for salary in lieu of notice is also awarded to the cw1 only since the cw2 was paid one month's salary in lieu of notice after termination in September 2014.

Leave

22. CW1 never prayed for leave but cw2 prayed for 3 years leave. He did not however give particulars. The Respondent has however proved that cw2 was paid his leave in September 2014.

Gratuity

23. This prayer is dismissed because the claimants were contributors to the NSSF and no contractual provision entitles them to gratuity on termination.

24. The award for the claimants is summarized as follows:-

Martin Kalama Mwatsuma

One month noticekshs 6270

Compensationkshs 37620

Kshs 43890

Frankline Ndaa Tune

Compensationkshs. 60,000.

Dispensation

25.For the reasons stated above, judgment is entered for the Claimants declaring the termination of their employment unlawful and awarding them the aggregate sum of kshs. 103890 plus costs and interest.

Signed, Dated and Delivered at Mombasa this 1st day of July 2016.

ONESMUS MAKAU

JUDGE