



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 1398 OF 2014

SIMON MAKAU MUTUKU.....**CLAIMANT**

VERSUS

COCONUT LIMITED.....**RESPONDENT**

JUDGMENT

1. The Claimant filed his suit against the Respondent on 19th August 2014. He stated that he was employed in October 2010 as a storekeeper at the restaurant with a starting salary of Kshs. 15,000/-per month exclusive of house allowance. He averred that the contract was never reduced into writing by the Respondent in contravention of Section 9 of the Employment Act 2007. He stated that he worked with diligence until 31st January 2014 when the Respondent called the Claimant and without colour of right terminated the Claimant's employment unfairly and unprocedurally. He averred that the reasons given to the Claimant regarding his termination were not genuine and did not follow the procedural requirements of Section 40 and 41 of the Employment Act. The Claimant stated that the Respondent failed to pay the terminal dues and on making a demand the Respondent sought some invoices alleged to be in the possession of the Claimant 5 months after his departure on account of redundancy. The Claimant thus sought one month's salary in lieu of notice Kshs. 17,250/-, one month's salary in lieu of redundancy Kshs. 17,250/-, days worked in January 2014 Kshs. 17,250/-, leave balance for 2011 Kshs. 17,250/-, severance pay at 15 days for each completed year of service Kshs. 28,875/-, house allowance from October 2010 to April 2013 at the rate of 15% of basic pay Kshs. 70,875/-, unlawful deduction of salary May 2013 to December 2013 Kshs. 15,625.16, 12 months compensation due to unfair termination of employment. The Claimant also sought costs of the suit, interest at Court rates and a certificate of service.

2. The Respondent filed a response on 21st October 2014 and stated that the Claimant was employed as a storekeeper but denied that the Claimant's salary was never reduced into writing and averred that the agreed salary of Kshs. 15,000/- was inclusive of house allowance. The Respondent averred that by way of letter dated 18th January 2014, the Claimant was notified that the Respondent was in the process of restricting its business and as a result the Claimant's position had become redundant. The Respondent denied that the Claimant's termination was without notice. The Respondent averred that it complied with Section 40 and 41 of the Employment Act 2007 and further stated that it had never refused, failed and/or neglected to pay the Claimant his dues. The Respondent averred that the payment of the Claimant's terminal dues will be subject to him handing over all the Respondent's documents and property which were in his custody as the store keeper. The Respondent stated that it was ready and willing to pay the Claimant his terminal dues being one month's salary in lieu of notice, days worked in January 2014, severance pay at rate of 15 days for each completed year of service, outstanding leave days and certificate

of service. The Respondent averred that the termination of the Claimant was legal, proper and the reasons therefore were adequately explained to the Claimant. The Respondent thus sought that the Claimant's suit be dismissed with costs.

3. The Claimant testified on 10th November 2015 and reiterated his claim. He stated that he was declared redundant without notice being given as required in law and that he was not paid his dues. He thus sought the one month salary in lieu of notice being Kshs. 15,000/- plus 15% for house allowance, one month salary for January 2014, leave for 2011, severance pay at the rate of 15 days for each year worked. He testified that he was entitled to house allowance from April 2013 to October 2014 at 15% of basic pay as well as a refund of a sum of Kshs. 13,000/- unlawfully deducted from his salary. He sought 12 month's salary compensation for the unlawful dismissal, costs of the suit as well as the certificate of service.

4. The Respondent did not appear at the hearing and the case was due for judgment when the Respondent sought to set aside the proceedings and have the Respondent cross-examine the Claimant and tender its evidence. The Court granted the request after hearing the motion to set aside *inter partes*. The hearing took place on 14th June 2016 and the Claimant was cross-examined by Mr. Kenyatta for the Respondent. He testified that he was employed by the Respondent and earned Kshs. 15,000/- inclusive of house allowance. He stated that he was given the letter of redundancy and was not given any explanation prior to the issuance of the letter. He read the letter and admitted that it indicated he would be paid his dues. He testified that the house allowance was factored into his pay in 2013. He denied any knowledge of a dispute on invoices and stated that he only got to learn of it here in Court.

5. In re-examination by his lawyer Mr. Nyabena, he testified that he was not informed of the restructuring or the looming redundancy. He stated he was just to go and return on Monday.

6. The Respondent called Mr. Lameck Okach the general manager of the Respondent. He testified that he knew the Claimant a former employee of the Respondent. He stated that the Claimant worked in the stores from 2010 and that the Claimant's employment came to an end in January 2014. He testified that he explained to the Claimant that there was downturn and that the Claimant would be laid off and that the Claimant accepted the redundancy. He stated that he prepared the Claimant for the redundancy and that the letter of redundancy was 18th January 2014. He confirmed that the Claimant was not paid his dues after being declared redundant. He stated that the basic was Kshs. 15,000/- and gross Kshs. 15,000/- and that in the beginning it was just a blanket Kshs. 15,000/- and later it was categorized to include house allowance.

7. In cross-examination by Mr. Nyabena, he testified that he had worked at the Respondent for more than 10 years. He stated that the Claimant was employed but he was not privy to whether a letter of employment was issued. He testified that he prepared the redundancy notice and issued it to the Claimant on instruction of management. He stated that he never issued a notice before the redundancy letter. He was referred to the payslips and testified that there was payslip with a basic of 15,000/- and later another payslip with a reduced basic of 13,043/-.

8. In re-examination by his lawyer Mr. Kenyatta, he testified that the intention of the letter of redundancy was to make it official and inform the Claimant and that it was proper notice. He stated that the Respondent contested the payment of the amounts claimed as house allowance arrears, unlawful deduction and the 12 months compensation sought.

9. The Claimant filed submissions on 28th June 2016 and the Respondent on 21st July 2016. The Claimant submitted that his termination was unlawful and that redundancy was defined in Section 2 of the Employment Act 2007 and that the procedure of declaring redundancy was set out in Section 40 of the Employment Act 2007. The Claimant submitted that he was not notified as required by law and neither was the Labour Office notified of the redundancy. The Claimant relied on the case of **David Opondo Omutelema v Thomas De La Rue (Kenya) Ltd Cause No. 390 of 2010** (unreported) where Rika J. held that the letter to the Claimant and copied to the labour office was a proposal of intention to declare a redundancy and the letter is an invitation for discussions on the redundancy following which the redundancy is undertaken. The Claimant submitted that under Section 41 of the Employment Act the

employer was bound to accord him a hearing before termination. The Claimant denied being in possession of the invoices claimed by the Respondent as he handed over before departure. The Claimant submitted that he was entitled to the reliefs claimed and submitted that under Section 31 of the Employment Act 2007 the Respondent was bound to provide accommodation or pay in lieu thereof.

10. The Respondent submitted that the Claimant had a discussion with the manager and was given a calculation of his terminal dues which he did not dispute at the time and that he was earning Kshs. 15,000/- which was later split to basic pay of Kshs. 13,043.48 and house allowance of Kshs. 1,956.52/-. The Respondent submitted that the claim for house allowance was an afterthought and that the Claimant never complained about the issue of house allowance. The Respondent submitted that upon a decision being made to declare the Claimant's position redundant a meeting was held between the Claimant and manager and an explanation was given to the Claimant and that it was after the meeting that the Claimant went to the accountant to collect his terminal dues work schedule and declined to sign it. The Respondent submitted that the Claimant was not a member of any trade union and that the Respondent complied with the requirements of Section 40(1)(b) of the Employment Act and that the process which led to the declaration of the Claimant's position redundant was therefore procedurally fair and lawful. The Respondent submitted that the redundancy was explained to the Claimant in a language the Claimant understood. The Respondent submitted that the Claimant should pay the costs as he abandoned the redundancy process midway and came to Court prematurely. The Respondent urged that the Court dismisses the suit with costs.

11. In matters of redundancy, the provisions of the Employment Act 2007 are 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.

12. The provisions under Section 40 above are couched in mandatory terms. There must be notice, the notice must be copied to a labour officer and where the employee is a member of a union to that said

union. In addition the employer must make payment to the employee of his dues at the point of termination on account of redundancy. The leave dues must be paid off in cash and so on. It is not disputed that the Claimant was declared redundant by letter of 18th January 2014. In it, he was notified that he was being declared redundant. It is not disputed that the letter was not copied to the labour officer. It is also not disputed that there was no payment made of the terminal dues the Claimant was entitled to. This was an abridgement of the law and thus the declaration of redundancy having missed this key step was illegal and unfair. As held in the case of **David Opondo Omutelema v Thomas De La Rue (Kenya) Ltd** (*supra*) the redundancy process has a various facets and the failure by employer to follow the law in declaring a redundancy makes the process unlawful and unfair. The Claimant sought payment of house allowance. Under Section 31 of the Employment Act, there is provision as follows:-

31.(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service—

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

13. The law provides that the Section does not apply where the employee has a contract that specifies that the salary is consolidated. In this case, there was no contract of employment and the employee was not a member of a trade union with which the employer has a collective bargaining agreement that provides that the salary is consolidated. The Claimant therefore had an expectation for house allowance in the months there was no provision for it. He was legally entitled to it. If the salary was consolidated there should have been a contract or CBA to that effect. In the premises the Claimant would be entitled to recover the unpaid house allowance for the 30 months. The Respondent did not prove that the Claimant stole its invoices or that he had custody of them. The Respondent was able to produce copies of the invoices which did not show that they were either issued or handled by the Claimant. The Claimant did not prove that there were any unlawful deductions from his salary. The only deductions noted that were not statutory were the loan deductions.

14. The termination was unlawful and unfair in the circumstances and the Claimant's claim is successful. I enter judgment for the Claimant against the Respondent as follows:-

(a) Salary in lieu of notice Kshs. 15,000/-

(b) Salary for January 2014 Kshs. 15,000/-

(c) Unpaid house allowance for 31 months Kshs. 67,500/-

(d) Kshs. 135,000/- being 9 month's salary compensation for unlawful termination.

(e) Certificate of service in terms of Section 50 of the Employment Act

(f) The items in a), b), c), and d) above to be subject to deductions in terms of Section 49 of the Employment Act.

(g) Costs of the suit

(h) Interest on a), b), c), d) above at Court rates from the date of judgment until payment in full.

Orders accordingly.

Dated at Nairobi this 29th day of July 2016

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 2nd day of September 2016

Nduma Nderi

PRINCIPAL JUDGE