



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 525 OF 2015

BETWEEN

ANDREW MAJAN CHEGERO CLAIMANT

VERSUS

READY CONSULTANCY COMPANY LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Isaac Onyango & Company Advocates for the Claimant

Marendo Birir Shimaka & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed his Statement of Claim on the 23rd July 2015. He states he was employed by the Respondent outsourcing Company as a Clerical Officer, sometime in September 2008. He was assigned to Mombasa Maize Millers Limited. He was served a notice of restructuring by the Respondent on or around 28th February 2015. His contract of employment was terminated. He was paid Kshs. 15,835 as terminal dues. He earned a monthly salary of Kshs. 18,850 as at the time of termination. He states termination was unfair and unlawful and seeks orders against the Respondent for:-

- a) A declaration that termination was unfair and unlawful.
- b) 1 month salary in lieu of notice at Kshs. 18,850.
- c) 12 months' salary in compensation for unfair termination, at Kshs. 226,200.
- d) Service pay at the rate of 1 month salary for each of the 8 years completed in service, at Kshs.

150,800.

Total Kshs. 395,850

e) Certificate of service to issue.

f) Costs, Interest and any other suitable reliefs.

2. The Respondent filed a Statement of Response on the 10th September 2015. It conceded to have employed the Claimant, but denies terminating his contract of employment. The Claimant was transferred to the Respondent's Branch in Kisumu, but declined transfer. He did not report to his new station.

3. The Claimant testified, and closed his case, on the 26th February 2016. The Respondent adopted its Pleadings, Documents and Submissions, opting not to call Witnesses. Hearing therefore closed on the 26th February 2016. The dispute was last mentioned on the 30th June 2016, when Parties confirmed the filing of their Submissions and the decision of the Court reserved for 14th October 2016.

4. The Claimant restated his employment history and the terms and conditions of service, as contained in the Statement of Claim. He testified it is true he was to be transferred to Kisumu under restructuring. He was to earn Kshs. 470 per day on transfer, instead of the monthly pay he was earning while at Mombasa. There was no notice of redundancy. The criterion for transfer was not given. He was issued discharge note the same day. He was advised in the notice he would be paid 1 month salary in lieu of notice. He was to work 3 days in a week at Kisumu. He did not take the offer. He was not offered relocation allowance. He had worked for 7 years. He was 29 years on the date of giving evidence. He was a Recruiting Clerk while at Mombasa, involved in the recruitment of Casual Employees. There were 3 such Clerks at Mombasa. Only the Claimant was affected.

5. Questioned, the Claimant testified the transfer letter did not mention termination. He deduced it was a termination, not a transfer decision, because he was being engaged as a Casual Employee at the new station. He did not have any document to show he was transferred to work as a Casual Employee. He reported in Kisumu on 16th March 2015. He reported to the Recruitment Clerk. The transfer letter said he reports on 1st March 2015. The Kisumu Company was the same Employer as the Respondent. He was paid 1 month salary in lieu of sufficient notice to transfer. He was paid pro rata annual leave, as a way of clearing with the Mombasa Office. He stayed in Kisumu for 1 day. He complained in Mombasa about his change of terms. He did not write a letter complaining. He declined to work in Kisumu. He was subscribed to the N.S.S.F. He stated on redirection that transfer letter was not copied to any Officer in Kisumu. He was not advised whom he was to report to in Kisumu. The letter issued on 28th February 2015. He was to report the following day. There was no transition period.

6. The Respondent submits the Claimant never protested about his transfer. He was paid 1 month salary in lieu of notice, and pro rata annual leave, to assist him transition. He would be paid his salary for February 2015, on 1st March 2015. He did not report to Kisumu at all. He defended himself saying he reported for 1 day, which in any case would still confirm he deserted. His contract was not terminated by the Respondent. He did not work in Kisumu at all, to ascertain the terms and conditions of employment. He chose to go to his rural home, only to resurface later with summons to the Respondent to appear before this Court. He did not show there was a redundancy situation. He was being transferred to work at another Branch. He is not entitled to the remedies claimed.

The Court Finds:-

7. There is absolutely no evidence that the Respondent, or its Client Mombasa Maize Millers, declared the Claimant's position redundant on 28th February 2015.

8. The letter dated 28th February 2015 advised the Claimant that Mombasa Maize Millers Limited, was

carrying out some structural changes to enhance efficiency. This advice did not allude to redundancy as one way of restructuring.

9. Companies frequently carry out financial and organizational restructuring, without declaring redundancies. It is not proper that every time an Employee is advised some form of structural change is being carried out, the Employee rushes to Court alleging his position is in danger of being phased out, and employment at risk of termination. When such structural change has been put in place, it does not necessarily result in unfair termination for the affected Employee. Companies restructure their assets and liabilities, to achieve the most beneficial business environment. They undertake organizational restructuring for such reasons as the need for new skills and capabilities. It may also be that parts of the business are under or over-staffed. Restructuring does not denote redundancy. An Employee may therefore be transferred to another Branch or Section, as a way of carrying out organizational restructuring. Even where no broad organizational restructuring is underway, an Employer has the prerogative in routine transfer of Employees. This is a management prerogative. The Employer knows best where the skills, abilities and experience of an individual Employee are needed within the organization.

10. What the Claimant was told was that the Respondent would transfer him to Kisumu as part of its organizational restructuring. He was not told there was no more work. The Respondent had no reason to consider the law of redundancy, and bring into play Section 40 of the Employment Act. The Respondent gave the Claimant instructions to report to Kisumu. It did not terminate the Claimant's contract.

11. The Claimant did not report on 1st March 2015 as advised. He stated he reported for 1 day later on 16th March 2015. He did not tell the Court why he left Kisumu, even after making a late report contrary to the instructions given by the Employer. He did not show to the Court he was instructed he would work at Kisumu as a Casual Employee. He did not show his terms of employment had been altered. All that had been advised in writing was that his place of work would change. He was paid 1 month salary and pro rata annual leave, to enable him clear from Mombasa. He did not complain about the short notice to transfer, the facilitation, or even about the changed terms and conditions of work; he went to Kisumu for 1 day, then proceeded to his rural home, before coming to Court to pursue this Claim for unfair termination. The Court is satisfied there was no termination initiated by the Respondent. ***The Claim has no support in evidence and is dismissed with no order on the costs. The Respondent shall however release to the Claimant his Certificate of Service as commanded by Section 51 of the Employment Act.***

Dated and delivered at Mombasa this 14th day of October 2016.

James Rika

Judge