



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 890 OF 2015

FREDRICK MWANGI CHEGE.....CLAIMANT

VS

KIGLESS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 1.10.2009 before the Senior Magistrates Court, Mombasa before it was later transferred to this court on 3.11.2015. The suit seeks to recover terminal dues amounting kshs. 181,250 made up of one month salary in lieu of notice, leave, gratuity and a penalty.
2. The respondent admits having retrenched the claimant but denies liability to pay the whole kshs.181,250. She has however offered to pay kshs.37,500 to the claimant as salary in lieu of notice but the claimant has rejected the said sum.
3. The suit was heard afresh on 11.7.2016 when the claimant testified as Cw1 but the respondent called no witness. Thereafter both parties filed their closing submissions.

Claimant's case

4. Cw1 told the court that he was employed by the respondent as an Accountant on 1.1.2000 and worked upto 24.5.2007 when he was terminated on ground of redundancy. That although the respondent's Director had verbally notified him of the intended redundancy, no written redundancy notice was ever served on him by the respondent. That although the claimant was not paid any dues, the respondent's director verbally promised to pay him his dues at the rate of one month salary per year of service. That as at the time of his termination Cw1 was earning kshs.28,750 per month according to the letter dated 16.2.2007 and payslip for January 2007.
5. On cross examination the claimant contended that the company had no liquidity problems. He maintained that, as an Accountant he deals with the respondent's cash flow and as such he had the knowledge of the respondents' liquidity levels. He denied ever absconding duty voluntarily or ever refusing payment of his terminal dues from the respondent.

Analysis and Determination

6. There is no dispute from the pleadings, evidence and submissions that the claimant was indeed employed by the respondent from 1.1.2000 until 24.5.2007 when he was laid off because of low business on the part of the respondent. The issues for determination are:-

(a) Whether the claimant's employment was unlawfully declared redundancy.

(b) Whether the reliefs sought ought to issue.

Unlawful Redundancy

7. There is no doubt that the cause of Action herein arose when the repealed Employment Act was in force. Section 16 A (1) of the said Act barred the termination of a contract of service on account of redundancy unless the employees union and area Labour officer were notified of the reason and the extent of the intended redundancy; fair selection done with regard to seniority of skill and responsibility of the affected employees; and that the employee declared redundant is paid all his accrued benefits plus severance pay.

8. In this case, no written notice of the redundancy was served on the claimant and the area Labour officer before the termination of the claimant's employment. Consequently the said redundancy was unlawful because it violated the mandatory provisions of section 16 (A) of the Employment Act (Repealed).

Reliefs

9. The claimant has made the following prayers:-

(a) One month salary in lieu of noticekshs.25,000.

(b) Leave for 2007.....kshs.25,000.

(c) Gratuity for eight years.....kshs.200,000.

(d) Penalty 2 ½ months.....kshs.31,250.

Salary in lieu of notice

10. The claim for salary in lieu of notice is admitted by the respondent and I allow the same at kshs.25,000 as prayed.

Leave

11. The claimant pray for one month leave at kshs.25,000 for the year 2007. The contract of employment provided for 28 leave days per year which equal to 2.33 days per month and 11.66 leave days in 5 months. Based on monthly salary of kshs.28,750, I award him kshs.12,900.65 for leave as no evidence was adduced to prove that he utilized the leave earned in 2007.

Gratuity

12. The claimant prayed for gratuity at the rate of one months salary per year of service. The said claim is founded on oral undertaking allegedly made by the respondent director on 23.5.2007 and repeated on 24.5.2007. The said evidence is however not capable of proving the claim for gratuity and such the said claim is dismissed.

Penalty

13. The claim for penalty was not particularized and no evidence was tendered to substantiate the same. I therefore dismiss it.

Disposition

14. For the reasons stated above I enter judgment for the claimant in the sum of **kshs.37,900.65** plus costs and interest from the date of filing suit.

Signed, dated and delivered this 14th October, 2016.

ONESMUS MAKAU

JUDGE