



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT NAIROBI

CAUSE NO. 1698 OF 2011

SAMUEL AMENYA CLAIMANT

VERSUS

CRAFT SILICON LIMITED RESPONDENT

Mr. Odhiambo for claimant

Mr. Rusiega for respondent

JUDGMENT

1. Claimant seeks payment of severance pay and compensation for wrongful termination of employment on account of redundancy following disbandment of the respondent's quality assurance department on account of poor output.
2. The claimant was employed by the respondent on 22nd April 2003 and he worked continuously until 19th November 2005 when he joined Equity Bank Limited. In February 2007, the claimant came back to the respondent and was employed as a project manager. He was assigned head of quality assurance department in 2009 until he left employment on account of redundancy.
3. The claimant earned a gross salary of Kshs.236,670.
4. On 1st August 2011, the claimant received notice of termination of contract indicating that the management had decided to disband the quality and assurance department since it was unable to fulfil the purpose for what it was formed.
5. On 3rd August 2011 the respondent issued the claimant with a computation of his dues together with a cheque of Kshs.197,406 being one month salary in lieu of notice pay, nineteen (19) days untaken leave for 2010/2011 and pay to NSSF and NHIF deductions.
6. The claimant was aggrieved by the termination and wrote a demand letter through his advocates on 16th August 2011. The claimant states that the termination was unlawful and unfair and sought payment of severance pay for four (4) years the claimant had worked for the respondent together with refund of staff welfare fund dues.
7. The respondent denies the claimant was declared redundant by a letter dated 29th August 2011 and levelled new allegations of claimant's alleged poor performance which allegedly resulted in the termination of his employment contract.

8. The court has perused the letter of termination dated 1st August 2011 and notes the following:

- a. the respondent had made decision to disband the quality and assurance department which the claimant headed for operation reasons;
- b. No specific allegations of poor work performance or misconduct were made against the claimant in the letter of termination;
- c. The termination of contract was without notice since termination was effective immediately.
- d. No offer of payment of terminal benefits was made in the letter.
- e. The letter was not copied to the Ministry of Labour.

Defence

9. The respondent filed memorandum of reply on 20th February 2012 and witness statements of one Sebastian Wambua the head of administration of the respondent and Fredrick Okwaro head of support and implementation on 25th November 2015.

10. The respondent in its defence states that the claimant was re-employed by the respondent on 15th February 2007 as a project manager and was assigned to head the quality assurance department in 2009 until he left on 1st August 2011.

11. The gross salary of Kshs.236,640 earned by the claimant at the time of termination is not in dispute. It is not in dispute that termination of employment was by a letter dated 1st August 2011 produced and marked exhibit 'B'.

12. The respondent alleges it paid all terminal dues to the claimant in the sum of Kshs.192,653. The witness statements support the averments in the memorandum of reply and same was embellished in the oral testimony of the two witnesses and in the final submissions by the respondent. The respondent prays that the suit be dismissed with costs.

13. Determination

There are only two (2) issues for determination in this suit as follows;

- i. Whether the termination of employment of the claimant was for reasons of redundancy or not and if so whether respondent complied with the requirements of section 40 of the Employment Act, 2007;
- ii. Whether the claimant is entitled to the reliefs sought.

Issue i

14. The letter of termination of employment of the claimant, gives only one reason for the termination that, the management had decided to disband the quality and assurance department which was at the time headed by the claimant.

15. The claimant was therefore declared redundant within the meaning of section 2 of the Employment Act, 2007 which defines redundancy as follows;

"redundancy" means 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.”

16. From a plain reading of the letter of termination this was a clear case of redundancy upon abolition of office the respondent having determined the services of the department and the claimant to be superfluous.

17. The court finds that the termination of the employment of the claimant was for reasons of redundancy. This being so, the respondent was bound to strictly follow the provisions of section 40 of the Employment Act, 2007 in the following respects;

a. give not less than one month notice to the employee and the Labour office of the decision to terminate a contract of service on account of redundancy;

b. give regard in the selection of employees to be declared redundant to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

f. pay off the leave due to the employee(s) in cash;

g. pay an employee declared redundant, not less than one month's salary in lieu of notice;

pay an employee declared redundant severance pay at the rate of not less than fifteen (15) days pay for each completed year of service.

18. From the evidence before court, the respondent did not give the employee or the Labour office at least one month notice of the intended termination of employment on account of redundancy.

19. Secondly, the respondent did not afford the claimant opportunity to understand the selection criteria used to declare him redundant. Clearly no consultations took place since the one month notice period meant for that purpose was not given.

20. The respondent paid the claimant for leave days not taken and one month salary in lieu of notice. It should be noted that in terms of section 40, the payment under subsection (f) does not relieve the respondent the responsibility of giving the one month notice under subsection (a) and (b) which is meant for consultation with the employee (s) affected and the Labour officer on matters set out under subsection (c).

21. It is the court's finding that the termination of the employment of the claimant on account of redundancy was not in keeping with the mandatory provisions of section 40 of the Act, and was therefore unlawful and unfair. The termination therefore violated section 45 of the Act, which mandates an employer to terminate the employment of an employee for a valid reason and in terms of a fair procedure.

22. Accordingly, the claimant has proved his case on a balance of probability and the claimant is entitled to the reliefs sought in the memorandum of claim.

23. The court enters judgment in favour of the claimant as follows;

a. Payment of Kshs.478,070.97 being the equivalent of severance pay for each completed year of service and welfare dues;

b. Compensation.

The claimant had served the respondent for four (4) years and was declared redundant for operational reasons. The claimant did not therefore contribute to the termination of his employment. The claimant lost career prospects and source of income and livelihood. The claimant was not paid the terminal dues he was entitled to at the time of termination. The claimant has had to wait over five (5) years to receive

his dues and has suffered loss and damage.

24. The claimant had served the respondent for four years and no adverse record was produced against him during that period of service.

25. The court awards the claimant six (6) months salary as compensation for unlawful and unfair termination of employment in terms of section 49 (1) (c) as read with section 49 (4) of the Employment Act, 2007 in the sum of Kshs.1,420,020.

26. Final orders of the court are for payment by the respondent to the claimant;

i. Kshs.1,898,090.97;

ii. interest on the award at court rates from date of filing suit till payment in full;

iii. costs of the suit.

Dated and delivered at Nairobi this 2nd day of December 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE