



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 60 OF 2014

EVANS MUCHANGI MUREITHI.....CLAIMANT

v

J B DRILLING KENYA LTD.....RESPONDENT

JUDGMENT

1. Evans Muchangi Mureithi (Claimant) in a not very concisely pleaded Memorandum of Claim sued J B Drilling Kenya Ltd and Medic International on 12 March 2014, stating the issues in dispute as

1. Unfair termination
2. Notice
3. Salary arrears.

2. J B Drilling Kenya Ltd filed a Response on 31 March 2014. Medic International did not file a Response.
3. On April 2014, the Claimant informed the Court that he needed to file an Amended Memorandum of Claim. The Court directed him to file the same before 8 April 2014, and he complied and filed an Amended Memorandum of Claim.
4. In the Amended Memorandum of Claim, the Claimant removed Medic International as a Respondent. Consequent upon the Amended Memorandum of Claim, J B Drilling Kenya Ltd (Respondent) filed an Amended Response on 13 May 2014. The Claimant filed a Reply to the Response on 22 May 2014.
5. On 30 May 2014, the Respondent filed its Documents. The Cause was heard on 2 December 2014, and the Claimant filed his written submissions on 9 December 2014 while the Respondent filed its submissions on 20 January 2015. The submissions were highlighted on 4 February 2015.
6. The Court has considered the pleadings, documents and testimony by the witnesses and the submissions and identified the issues for determination as, *whether the termination of Claimant's employment was unlawful/unfair, whether the reduction of Claimant's remuneration was lawful/fair, whether Respondent should be liable for any claims against Medic International* and appropriate remedies.
7. But some background information first.
8. The Claimant was employed by the Respondent on 19 August 1999 as a Finance Officer. The Respondent increased his salary to Kshs 9,000/- on 14 September 2002, Kshs 12,000/- on 30 October 2003, Kshs 26,000/- on 28 July 2005 and Kshs 39,000/- on 27 September 2007.
9. On 15 June 2006, the Claimant and Medic International entered into a Memorandum of

Agreement for the Claimant to provide accounting services to Medic International for a monthly consideration of US \$ 100 with effect from 1 January 2006.

Whether termination of Claimant's contract was unlawful/unfair

10. The Claimant's pleaded case is that his employment was terminated by the Respondent and Medic International around 14 March 2011 without notice and contrary to section 35 of the Employment Act, 2007.
11. He also pleaded that on the material day, the Respondent's directors gave him an ultimatum to accept a reduced salary of Kshs 20,000/- or quit and they gave him a schedule of terminal dues. He further pleaded the real reason for the termination of employment was given as rationalisation of staff in the recommendation letter he was given.
12. In his testimony, the Claimant stated that on 14 March 2011, while in the office, a Director of the Respondent, Krisna Belknap went to his office and they proceeded together to the office of Tom Armstrong, another Director.
13. In the office, the Directors informed him that they would release him if he was not ready to accept a reduced salary of Kshs 20,000/-.
14. In cross examination, the Claimant stated that he was paid salary in lieu of notice and other dues and was released without being given a termination letter. Reasons for termination were not given.
15. The Respondent in the Amended Response denied that it unfairly or unlawfully terminated the services of the Claimant. It also pleaded in the same paragraph 4(h) that a meeting was held with the Claimant and he was informed that because Medic International was winding up operations by February 2011, the Respondent could not fully engage him because his duties had since the coming up on the scene of Medic International been re-organised and re-assigned to other staff, and that the Claimant was paid one month salary in lieu of notice pursuant to section 36 of the Employment Act, 2007.
16. Jeremy Thomas Armstrong, a Director of the Respondent testified. He stated that the Respondent employed the Claimant in 1999, and his employment status changed on 27 September 2007 when he took on duties at Medic (K) Ltd. As a result, other staff were engaged to carry on Claimant's duties. When operations of Medic (K) Ltd were closed, Claimant was paid.
17. He also stated that a meeting was held with the Claimant and he was aware of what was happening and knew informally that he would be released, and that other employees had been released.
18. In cross examination, he stated that the reasons for the termination of the services of the Claimant were not reduced into writing though they were discussed with him.
19. He confirmed that the Claimant worked for both the Respondent and Medic International.
20. From the testimony of the Claimant and the Respondent's Director, it is crystal clear that the Claimant's employment was terminated by the Respondent.
21. The reason given by the Respondent's witness that the reasons were discussed with the Claimant at a meeting agree with the version given by the Claimant.
22. Those reasons appear to be that the Claimant had been given responsibilities in Medic international and Medic (K) Ltd and thus his duties with the Respondent were assigned to other employees. Medic (K) Ltd was also closing.
23. The termination of the Claimant's employment was therefore at the behest of the Respondent and the reasons were not based on any *misconduct, poor performance or physical incapacity* on the side of the Claimant.
24. As far as the Court can tell and it so finds, the termination of the Claimant's contract was involuntary on his part. This is what the law categorises as redundancy. The Claimant's position had become superfluous.
25. The Case herein was not presented as one of redundancy though. But the Respondent's own case leads to the inescapable conclusion that it was a redundancy.
26. Termination of employment through redundancy is governed by section 40 of the Employment Act, 2007. There are about 7 conditions to be fulfilled by an employer.
27. There is no suggestion that the Claimant and the local Labour Officer were informed in writing, one month in advance of the intended redundancy. How the Claimant was selected was not disclosed. Severance pay was not paid.

28. The Court therefore reaches the conclusion that the termination of the Claimant's employment through redundancy was procedurally unfair.
29. Where an employer decides to terminate a contract through redundancy and there is a challenge, the employer, by dint of section 45(2)(b)(ii) of the Employment Act, 2007 is expected to prove the reasons as valid and fair and based on its operational requirements.
30. The Respondent opted to prosecute its case, not on the ground or defence of redundancy though all the facts and evidence presented by it in Court pointed towards redundancy.
31. There was no attempt to prove the reasons for redundancy in Court and on this ground, the termination of services of the Claimant was also unfair.

Whether reduction of salary was unlawful/unfair

32. The Claimant contended that his salary was raised to Kshs 39,000/- but reduced to Kshs 20,000/- and he made reference to a letter dated 27 September 2007.
33. There was a subsequent increase to Kshs 21,500/- from 27 November 2009.
34. The Claimant testified that he protested verbally and in writing against the reduction and was informed that if he did not accept the reduction, he should look for alternative employment.
35. He stated in cross examination that he continued performing the same duties and there was no change in employment status.
36. The Respondent's case on this issue was that the Claimant's wages were reduced as alleged in mid July 2007, and the Claimant was paid partial terminal dues before the reduced salary was effected.
37. The Respondent's director testified that the Claimant's employment status changed on 27 September 2007, and that he took more responsibilities with Medic (K) Ltd. He also stated that the Claimant signed an agreement with Medic Ltd on 12 December 2007 (for one year three months) which paid him for 10 months.
38. The Claimant on his part had annexed a Memorandum of Agreement with Medic International signed on 15 June 2006.
39. The parties did not give coherent statements regarding the reduction of the Claimant's salary and the relationship of the reduction with work to be performed for Medic Ltd and Medic International.
40. But the Court has keenly examined the relevant documentation. The Claimant signed the letter dated 27 September 2007 denoting his agreement to the reduction of the salary.
41. The general rule regarding variation of a term of a contract is clear. For any variation to be lawful, it must be mutually agreed between the employer and the employee (see *Jackson Berege v Maasai Mara University* (2015) eKLR, *Samuel Muchiri Gikonyo v Henkels Chemicals (EA) Ltd* (2014) eKLR, *Industrial Rubber Products v Gillon* (1977) IRLR 389 EAT, *Harlow v Artemis Ltd* (2008) IRLR 629, *Rigby v Ferodo Ltd* (1987) IRLR 516).
42. As between the Claimant and the Respondent, the Court is satisfied that the variation of the salary from Kshs 39,000/- to Kshs 20,000/- was mutually agreed and the Claimant voluntarily consented to the same.
43. And if I were wrong on the finding, I would still hold that the Claimant should not have waited for his employment to be terminated some 4 years later to challenge the variation. He should have walked away and claimed constructive dismissal. The Claimant must have acquiesced by his conduct to any variation.

Cause of action against Medic (K) Ltd and Medic International

44. The Claimant in his pleadings sought one month pay in lieu of Notice (Kshs 7,800/-), salary arrears (Kshs 390,000/- up to March 2011) and compensation (Kshs 93,600/-), totalling Kshs 468,000/-.
45. In the pleadings, the Claimant pleaded that he carried out certain accountancy roles for Medic International and at the same time, he worked for the Respondent. He pleaded there was common directorship. He also pleaded that his salary was not commensurate with his duties.
46. The Claimant annexed to the Memorandum of Claim, a Memorandum of Agreement between himself and Medic International. The agreement was effective from 1 January 2006 and the Claimant was to be paid US \$ 100 per month. For the work, the Claimant was paid US \$ 1000.

47. The Respondent on its part produced an Employment Contract between Medic Ltd and the Claimant and signed by the Claimant on 14 December 2007. The contract was effective for a period of 1 year and 3 months.
48. The Respondent annexed the Claimant's pay slips issued by Medic Ltd from October 2010 to February 2011 showing he was on a consolidated monthly wage of Kshs 50,000/-. Further, a document was produced indicating that the Claimant was paid a total of Kshs 225,000/- on account of Medic International and he acknowledged payment on 2 March 2011.
49. As between the Claimant and Medic Ltd, the contract was for a specified period and it made provision for the terms and conditions of employment, and I do not wish to say any more regarding it.
50. The Memorandum of Agreement with Medic International signed on 15 January 2006 appears to have been open ended. It provided for the remuneration. The Claimant seeks the remuneration he would have earned under this contract up to March 2011.
51. The Claimant pleaded he was paid the remuneration for 10 months and thereafter the payments ceased.
52. Generally, the parties did not give clear evidence regarding the relationship with the Medic International. Payment of wages is one of the *essentials* of the employment relationship. It is a fundamental term.
53. When an employer fails to pay wages, it is a fundamental breach going to the root of the contract.
54. The Claimant was last paid wages by Medic International sometime in 2007. He waited until he was discharged to claim what he claims to be salary arrears.
55. If this claim was genuine, the Claimant should have raised the complaints much earlier.
56. He has not demonstrated a cause of action for these claims against Medic International or the Respondent as an agent of Medic International.

Appropriate relief

Compensation

57. The Claimant sought Kshs 468,000/- as compensation from the Respondent.
58. He sought a further Kshs 93,600/- as compensation on account of the cause of action against Medic International.
59. The Claimant's position with the Respondent was declared redundant without complying with the law. The Respondent did not prove the operational reasons for the action.
60. The Claimant would be entitled to compensation because the termination through redundancy was unfair.
61. The Claimant served the Respondent for about 12 years. On separation, he was paid service pay. He had earlier been paid partial terminal benefits in 2007.
62. Considering the length of service and payments already made, the Court would award him the equivalent of 4 months gross wages as compensation. At time of termination, the gross wages was Kshs 21,500/-.

One month pay in lieu of Notice

63. The Claimant sought Kshs 7,800/- on account of one month pay in lieu of Notice as against Medic International.
64. This relief is not warranted, the Court having reached the conclusion the cause of action against Medic International should be dismissed.

Salary arrears

65. Under this head, the Claimant sought Kshs 390,000/- on account of duties rendered to Medic International.
66. For the reasons stated in paragraph 60 above, this head of claim is dismissed.

Conclusion and Orders

67.From the foregoing, the Court finds and holds that the Claimant's position was declared redundant without complying with the law and the action was unfair.

68.The Court awards and orders the Respondent to pay the Claimant

a. 4 months gross wages compensation Kshs 86,000/-

69.All the other claims are dismissed.

70.The Claimant to have costs.

Delivered, dated and signed in Nakuru on this 20th day of March 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kairo instructed by Nancy Njoroge & Co. Advocates

For Respondent Ms. Lubia instructed by Kagucia & Co. Advocates