



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1062 OF 2010

JOHN KINYANJUI.....CLAIMANT

VERSUS

INSTARECT LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed the suit on 17th September 2010 seeking resolution of a dispute he framed as wrongful dismissal and unpaid dues. He averred that he was employed by the Respondent since 1st March 2000 until 4th June 2010 when the Respondent unlawfully terminated his services without notice and without settling the Claimant's outstanding dues including pay in lieu of notice. The Claimant averred that the salary he earned was periodically increased from when he joined and at the time of leaving the company was Kshs. 35,800 inclusive of house allowance. The Claimant averred that he had accumulated 50 days of leave. He thus sought payment of the notice, the 50 days of leave, 4 days worked in June 2010 and severance pay for 10 years as well as costs of the suit.

2. The Respondent was opposed and filed a Memorandum of Defence on 28th June 2011. In the Defence the Respondent averred that it employed the Claimant on 1st March 2000 as a supervisor and he earned Kshs. 6,200/- per month plus house allowance of 1,300/-. The Respondent averred that on 27th November 2006 the Claimant's salary was increased to Kshs. 30,994/- while his terms of service remained the same. The Respondent averred that the Claimant was informed of the intended retrenchment of employees on 17th August 2009. The Respondent averred that the Claimant was advised to take leave which he did and was subsequently given notice of termination on 15th May 2010. The Respondent thus sought dismissal of the Claimant's case with costs.

3. The Claimant testified on 5th June 2013. He testified that he was employed by the Respondent for 10 years between 2000 and 2010. He testified that he was in pool installation and when not installing swimming pools he was maintaining them. He testified that on 4th June 2010 he was called by the Managing Director of the Respondent to the Boardroom and was advised that there was to be a restructure of the company. He was asked to hand in a resignation so that he could be hired on contractual basis and he declined as he would have lost his dues. He was sent on indefinite leave which he had not applied for. He testified that the letter was backdated to 15th May 2010. He reported the matter to labour office and on being summoned the company sent a representative, the Finance Administrator Mr. Mumo and during the meetings revealed that the Claimant had been dismissed from service. He received the letter of termination in June after visiting the labour office. He received a letter to take to the Respondent from the District Labour Officer seeking payment for pending accrued leave of 45 days as well as one month

notice, wages for 4 days worked and a certificate of service. He sought severance pay which he was advised to be a matter for the Industrial Court. He thus sought pay for 52 days of leave accrued, pay for 4 days worked in June and severance pay for the 10 years worked. He also sought costs.

4. In cross-exam in November 2014 after an aborted attempt at settlement the Claimant testified that the termination was on 4th June after he was asked to go on leave after he declined to resign. He stated that he was not given any notice and subsequently received the letter of termination which had been backdated. He testified that he gave the indication of the backdating to his lawyer and if the lawyer did not include it in preparation of pleadings then the advocate was answerable for that. He testified that he was in operations and thus was affected by the Internal Memo but he did not receive anything. He confirmed taking the matter to Labour and was given correspondence and his grievance was reduced to writing. He stated that he was told by the Labour officer that the claim he was making could only be made by the Industrial Court.

5. In re-examination he testified that other than the termination given in July there were no reasons given in the notice. He testified that the notice was delivered on 23rd July 2010 and his claim stated that he was terminated without notice or payment in lieu of notice. He stated that as of the date of filing the suit he had not received payment and to date had not received payment.

6. The Respondent called Lorna Wanjiru Mathenge who testified that she was the Human Resources & Administration Manager of the Respondent for the past 4 years. She testified that she was aware of the facts of the matter though she did not know the Claimant. She stated that the Claimant was employed in 2000 and he was terminated in 2010. She testified that in the year 2009 and 2010 the Respondent reduced the workforce and some positions were made redundant. The Claimant was made aware of this and there was a Memo to all staff. She testified that the Claimant wrote to the MD and he was told that his department was not doing so well and was given reasons. The letter of evaluation was discussed with the Claimant and the Claimant was made aware of being declared redundant. His pay was calculated and payment was made to him which took into account the Claimant's notice period, the leave days not taken and severance pay. She testified the calculation was done and payment made. The payments were made to the Ministry of Labour. She testified that payment was made but conceded that the documents exhibiting the payment were not attached. She testified that the matter was dealt with and finalized.

7. In cross-exam she testified that she joined the Respondent after the Claimant had left employment. She stated she could not tell if the evaluation was done during or prior to the termination as she had not seen the report of evaluation. She testified that there was communication between the Claimant and the Director. She testified that the Claimant received bonuses and in the letter it was indicated that he was dedicated. She testified that the policy in the company is that one would sign on receipt of mail and there was no indication that the Claimant had received the mail. She testified that the Respondent had no problem paying the Claimant's dues and she had the proof of payment to the Ministry of Labour but had not exhibited it. She testified that the pay included leave, severance and notice pay. She stated that the letter by labour officer did not include severance pay.

8. In re-examination she testified that the pool department was not doing well and the issue was a departmental one. She testified that the performance of the Claimant and bonuses paid were before the issuance of the internal memo on redundancy. She testified that she would not know when the Claimant received the notice of redundancy though the Claimant exhibited it in his claim. She testified that she did not know how the figures were arrived at by the labour officer and the Respondent had factored in severance pay.

9. The parties filed written submissions and the Claimant filed submissions on 10th December 2014. In his submissions he submitted that the claim was proved on a balance of probability. He relied on the case of **Fredrick Ogingo v Instarect Limited Cause No. 1064 of 2010**.

10. The Respondent filed submission on 12th January 2015. The respondent submitted that the Claimant had been declared redundant and was notified of this. The Respondent submitted that on being declared redundant the Claimant went to the labour office and the matter was resolved at conciliatory stage and the

Respondent directed to pay the Claimant 47 days leave, one month's salary in lieu of notice and a certificate of service. The Respondent submitted that as directed the Respondent prepared and processed the amounts in full settlement thereof to the labour office for onward transmission to the Claimant. The Respondent submitted that the Claimant's termination was proper and fair in compliance with the legal requirements as provided in the Employment Act 2007 Section 40(1)(f). It was submitted that the Claimant admitted in cross-exam as having received the sums due but that the same had failed to factor in severance pay. The Respondent submitted that the Claimant ought to have obtained a certificate of disagreement after payment was made without severance pay. The Respondent made submissions in regard to conciliation under Section 87(1) of the Employment Act, Section 69 of the Labour Relations Act and Rule 6(1)(b) of the Industrial Court (Procedure) Rules 2010. The Respondent relied on the case of **Safari Workers Union v Southern Cross Safaris Limited Cause No. 1447 of 2013**.

11. The Claimant's case is that he was dismissed without notice and certain dues which he was entitled to were not paid. The Respondent's case is that the Claimant was dismissed and his dues paid.

12. Under the Employment Act Section 40 makes provision for termination of contracts on account of redundancy 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

(e) upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(f) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(g) 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

(h) 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.

13. In the case before me, there is no proof the Labour officer was notified of the impending redundancy. The Claimant does not demonstrate any knowledge of the impending redundancy other than a general memo issued. In addition, no proof was tendered of the payment which allegedly was made by the Respondent and that it factored the leave days earned and not taken, notice and days worked. In the premises it would be fair to determine that there was no proper termination of contract. I am in agreement with Rika J. in the case of **Fredrick Ogingo v Instarect Limited Cause No. 1064 of 2010** wherein he states that the severance pay due to an employee cannot be removed by the fiat of a labour officer.

14. The Claimant would be entitled to severance pay in terms of Section 40(1)(h) of the Employment Act and the payment in lieu of notice as well as the leave days earned.

15. In the final analysis I will enter judgment for the Claimant against the Respondent for

a. Kshs. 179,000/- as severance pay

b. Kshs. 56,086/- as unpaid leave days

c. KShs. 35,800/- as notice pay

d. Kshs. 4,772/- for days worked in June 2010

e. Certificate of service in terms of Section 51 of the Employment Act

f. Costs of the suit and the sums in a), b), c), d) above be subject to statutory deductions in terms of Section 49 of the Employment Act.

Orders accordingly.

Dated and delivered at Nairobi this 5th day of **March** 2015

Nzioki wa Makau

JUDGE