



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 246 OF 2014

PETER KINGORI THUO.....CLAIMANT

VERSUS

DODHIA MOTORS LTDRESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimant has brought this suit claiming damages for wrongful and unlawful termination of his employment by the respondent in May 2011. It is the claimants case that he was declared redundant without following the procedure prescribed by the law. The key issue for the determination by the court is whether a breach of legal procedure renders redundancy wrongful and unlawful. The court's opinion on the foregoing question generally is that failure by the employer to adhere to the statutory procedure for redundancy renders the termination wrongful, unlawful and unfair, and entitles the employee to damages.

BACKGROUND

2. The claimant filed this suit on 28/5/2014 alleging that he was employed by the respondent from 2000 till May 2011 when his employment was terminated on ground that his services were no longer required. He avers that the said termination was wrongful and unlawful and prays for damages for the wrongful and unlawful termination plus accrued dues on separation in respect of leave earned, overtime worked and unremitted NSSF deductions.
3. The respondent has admitted the employment relationship between her and the claimant. She however avers that the claimant resigned in January 2009 and was paid all his accrued benefits and then re-employed in the same January 2009 till 2nd may 2011 when he was terminated through redundancy. She denies the claim for overtime, leave and refund of NSSF deductions but on without prejudice basis admits Ksh.66,682 being the claim for 12 years gratuity, salary for 2 days worked in June 2011, one month salary in lieu of notice less statutory deductions. In addition, the respondent has counterclaimed against the claimant a sum of ksh.150000 being loan advanced to him by the respondent on 10/12/2010. It is the respondents case that she was to recover the loan by deducting ksh.10000 per month from the claimant's salary but she did not.
4. In his response to the counterclaim, the claimant has admitted that he obtained the said loan of ksh.150000 from the respondent but avered that he had fully repaid the same as at the time of his dismissal.
5. The suit was heard on 2/12/2014 and 8/12/2014 when the claimant testified as CW1 and the respondent called Mr. Tanil Shah as RW1. After the hearing, counsel for both parties filed written

submissions.

CLAIMANT'S CASE

6. CW1 was employed by the respondent on 5/1/2000 as Clearing and Forwarding manager. He worked until 7/5/2011 when he was called to the office by the respondents 5 directors and verbally told that by the end of May 2011, his services at the company would no longer be needed. CW1 then continued until 31/5/2011 when his employment ended without any dues being paid to him. On 7/6/2011, CW1 was called by one director Mr. Sanje to discuss his terminal dues. The director calculated the dues at ksh.68000 and rounded it off to kh.70000 but CW1 declined on ground that it was too little.
7. CW1 stated that his monthly salary was Ksh.60000 of which ksh.33408 was in the form of cheque while kshs.20000 was in cash and the rest was withheld by the employer as statutory deductions. The cash pay was recorded in petty cash register. CW1 never went for his annual leave during his entire period of service due to the nature of his work which required him to work even on Sundays and holidays.
8. CW1 was asked by the employer to resign in order to continue working on contract basis. He did resign by a letter and the employer accepted the resignation on 6/1/2009 and re-employed him the same day. CW1 then continued with the same work until he was laid off in 2011. He denied being paid any dues amounting to ksh.84247 or at all for the period of service before 2009 when he resigned.
9. He prayed for dues accruing for the 11 years worked including leave earned and overtime worked during the said period of 11 years. He denied the counter claim of ksh.150000 loan and contended that between January and April 2011 he was deducted ksh.10000 per month from his salary and in May 2011, all his salary was not paid. He further contended that on 7/6/2011 he was told that his loan balance was ksh.1341 and he paid ksh.1500 though Mr. Sanje to clear the said debt.
10. On cross examination by the defence counsel, CW1 admitted that he took the loan of ksh.150000 from the respondent and paid Ksh.40000 by April 2011 through salary deductions. He further contended that the said ksh.40000 added to salary for May 2011 of ksh.53408 totalled to ksh.93408 only. He admitted that he did not pay the loan balance. He maintained that his salary was ksh.60000 per month of which ksh.33408 was by cheque and 20000 was cash. The rest was statutory deductions in respect of the ksh.40000 only. He admitted that the ksh.20000 was not subjected to taxation.
11. CW1 denied service of the redundancy notice dated 2/5/2011 and maintained that the termination was not redundancy. He maintained that he cleared with respondents and repaid the whole loan and never received any demand from the respondent ever since. CW1 admitted that he received cheque for ksh.84247 being terminal dues for the period of service before his resignation in 2009. After termination in 2011, CW1 maintained that the director calculated CW1's net dues at ksh.68682 but CW1 has termed it too little. CW1 admitted that the employer was entitled to set off her loan from his dues.

DEFENCE CASE

12. RW1 is a director in the respondent. He confirmed that CW1 was employed by the respondent in 2000 in the clearing and forwarding section and worked until 5/1/2009 when he resigned. CW1 was however re-employed on 6/1/2009 and his salary increased from ksh.30000 to ksh.40000 per month. CW1 was never the less paid ksh.84247 on 24/2/2009 as his dues accruing after his said resignation on 5/1/2009. The said sum according to RW1 was the net of all the statutory deductions. He denied that CW1 worked for overtime and maintained that CW1 went for all his leave days according to the bundle of documents produced. On 10/12/2010 CW1 was advanced a loan of ksh.150000 by the respondent and failed to repay as at 2011 when the respondent stopped dealing with clearing and forwarding and terminated CW1's services.
13. On cross examination by the claimant's counsel, RW1 stated that he did not know whether CW1 was given any written contract of employment in 2000. He maintained that as at 2009, CW1 was earning ksh.30000 which was paid by cheque. He contended that any further payments to CW1 was in form of petty cash for the expenses related to clearing and forwarding duties for which he

accounted using receipts. RW1 denied that the respondent used to keep petty cash register or pay roll. He denied that the respondent operated on public holidays and denied that 2/5/2011, when the alleged redundancy notice was written, was a public holiday. RW1 maintained that the respondent operated between 8.00am and 5pm and denied that CW1 was clearing ships passed 5pm. He denied that CW1's salary was ksh.60000 and that part of it was paid in cash. He explained that all the records related to CW1's leave and petty cash register were destroyed during renovations. He maintained that the CW1's resignation on 5/1/2009 was voluntarily due to salary which was negotiated and increased.

ANALYSIS AND DETERMINATION

14. After carefully going through the pleadings and considering the evidence and the submissions filed, it is clear that CW1 was employed by the respondent as Clearing and Forwarding manager in 2000 and resigned on 5/1/2009. It is also clear that CW1 was paid his terminal dues of ksh.84247 after his resignation in 2009. There is also no dispute that CW1 was re-employed by the respondent on 6/1/2009 in the same capacity and continued to work until 7/5/2011 when he was given a verbal notice by the respondent that his services were to end on 31/5/2011 as they would no longer be required. There is also no dispute that after 31/5/2011 CW1 was never paid any terminal dues although an offer was given to him after 7 days but he declined for being too little. There is further no dispute that CW1 was advanced a loan of ksh.150000 by the respondent and paid only a part thereof.
15. The issues in dispute revolve around the actual salary for the claimant, the nature of the termination, the damages payable to claimant and the outstanding loan counterclaimed by the respondent. The issues for determination are summarized as follows:-
 - a. **whether the claimant's salary was ksh.40000 or ksh.60000 per month.**
 - b. **Whether the termination of the claimants employment in May 2011 on ground of redundancy was wrongful, unlawful and unfair.**
 - c. **Whether reliefs sought by the claimant should be granted.**
 - d. **Whether the respondent's counterclaim should be allowed.**

Salary

16. The claimant contends that he was earning ksh.60000 per month of which ksh.20000 was paid in cash and was never subjected to taxation while ksh.40000 was subjected to statutory deductions and the net (ksh..33408) was paid by cheque. The respondent has disputed the claimants alleged salary of ksh.60000 and maintained that she only paid CW1 ksh.40000 per month by cheque less statutory deductions leaving a net of ksh.33408. The court is alive to the provisions of Section 10(7) of the Employment Act about the employer's obligation in a case like this, where no written contract is exhibited. The only letter available to support the contract of employment is dated 6/1/2009 but it does not give any details by the terms of the contract. That obligation notwithstanding, the court is not ready to take the explanation by the claimant on the tax evasion lightly. The alleged payment of ksh.20000 cash allegedly made in addition to the taxed ksh.40000 is disallowed in assessing the actual salary for the claimant. No party should come to court with unclear hands and expect to benefit from his illegality. Any employee like the claimant herein, who colludes with the employer to document less salary than what he actually draws in order to evade tax should know that he risks receiving less benefits in the end of his employment based on the documented salary. In that regard, and in answer to the first issue for determination, the court finds and holds that the correct salary for the claimant was ksh.40000 as proved by the defence using various copies of cheques produced herein.

Wrongful and unlawful termination

17. The reason for dismissal was that the respondent closed the clearing and forwarding section where at CW1 we working. His services were therefore no longer required by the respondent from 31/5/2011. The respondent has contended that the termination was by a lawful redundancy. She produced a letter dated 2/5/2011 purporting it to be a redundancy notice. No proof of service of

the notice was produced and no evidence was adduced to contradict CW1's evidence that the notice of redundancy was verbal and made on 7/5/2011.

- 18.Redundancy in Kenya is governed by Section 40 of the Employment Act which prescribes the procedure for declaring employees redundancy. The said provision require in mandatory terms that before redundancy, the employer shall serve at least one month notice in writing to the employee or his trade union (if a member of any union) and the labour officer. Thereafter the employer must conduct a fair selection process and then pay the affected employee all his accrued employment benefits, salary in lieu of notice plus severance pay. In this case the said statutory procedure was not followed. The claimant and the labour officer were never served with any written notice of the redundancy before 31/5/2011 and the claimant was not paid his dues on redundancy. Consequently the termination of the claimant's employment on ground of redundancy by the respondent was wrongful, unlawful and unfair. The answer to the second issue for determination is therefore in the affirmative.

CLAIMANT'S RELIEFS

- 19.In view of the finding above that the termination of the claimant's employment was wrongful, unlawful and unifilar, the court awards to the claimant compensation amounting to 12 months gross salary being ksh.480,000 for unfair termination. In making the maximum award the court has considered the length of period of service by the claimant and also the gross violation of the law by the respondent while laying CW1 off.

He will also get one month salary in lieu of notice. His evidence that notice to terminate his employment was given verbally on 7/5/2011 was not rebutted. The foregoing is fortified by the finding herein above that the notice(letter dated 2/5/2011) was never served upon the claimant. Even if it had been served, which has not, been proved, the same would have been shorter than the required one month notice.

- 20.The claim for leave, overtime worked and NSSF deductions not remitted between 2000 and 28/5/2011 are dismissed for being time barred and/or for lack of evidence. The suit herein was filed on 28/5/2014 and the said cause of action arose between 2000 and may 2011. Under Section 90 of the employment Act, a claim founded on employment must be filed in court within 3 years after it arises. In this case the leave, overtime and the NSSF contributions claimed were for period before May 2011. In addition the NSSF statement produced by the defence showed that the respondent remitted all NSSF contributions for the claimants religiously upto June 2011. Consequently, the claim for the refund of NSSF deductions is also bereft of merits.

counterclaim

- 21.The court has considered the claimant's uncontested evidence that his salary was deducted by ksh.10000 per month between January and April 2011 towards the loan repayment by the respondent. In addition his net salary for May 2011 after statutory deductions being ksh.33408 was attached by the respondent towards the said loan. The court therefore gives a credit to the claimant of ksh.73408 in respect of the said loan leaving a net balance of ksh.76592. The said net balance is to be set off against the sum awarded to the claimant above.

DISPOSITION

- 22.For the reasons stated above judgment is entered for the claimant against the respondent in the sum of ksh.403,408. The claimant will get half cost of the suit because the respondent has also partially succeeded in her counterclaim.

Dated, signed and delivered this 17th April 2015

O. N. Makau

Judge