



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1343 OF 2013

RAPHAEL MUCHUNU MWANGI.....CLAIMANT

VERSUS

DHL EXCEL SUPPLY CHAIN (K) LTD RESPONDENT

JUDGEMENT

1. The issue in dispute herein is the unfair termination/wrongful redundancy.
2. The claim was filed on 21st August 2013 and later amended and filed on 9th September 2013. The Respondent filed defence on 19th November 2013 upon which the Claimant filed his Response to the Defence on 6th March 2014. At the hearing, the Claimant supported his claim in evidence while the Respondent called Anthony Gakure as their witness. Both parties filed their written submissions.
3. The claim is that the Claimant was employed by the Respondent company on 1st December 2002 as Human Resource Accountant at a salary of kshs.70, 000.00 per month that was without a house allowance. He was issued with a contract letter upon confirmation of employment. The Claimant was termination upon a redundancy on 2nd November 2012 by which time he was at the position of Accounts Receivable Manager on a salary of kshs.230, 786.00. He was diligent at work and received recognition but was unfairly terminated on the reason of redundancy without the Respondent adhering to the law as set out under section 40 of the Employment Act, 2007. Failure to comply with the law made the termination null and void and of no consequence. That the act of terminating the Claimant was unilateral and an infringement of the claimant's rights where he suffered damage and loss and hold the Respondent liable.
4. The Claimant is seeking that the termination on account of redundancy be declared null and void and he be reinstated back to his position or alternatively he be paid his full benefits of;
 - a. *Salary for the 2 days worked in November 2012 at Kshs.25,568.90;*
 - b. *Accrued house allowance in arrears all being Kshs.2,788,416.00;*
 - c. *3 months' pay in lieu of notice Kshs.692,358.00*
 - d. *Relocation allowance Kshs.50,000.00;*
 - e. *Bonus pay Kshs.772,181.40;*
 - f. *Severance pay for 10 year Kshs.1,917,667.85;*
 - g. *12 months compensation Kshs.4,523,318.40; and*
 - h. *General damages at Kshs.9,154,083.40*

All amounting to Kshs.19, 923,594.40.

5. The Claimant is also seeking to have his Certificate of Service that was not issued. And the costs of his suit.

6. In evidence the Claimant testified that upon employment by the Respondent he worked diligently and was promoted his last position being that of Accounts Receivable for Kenya, Uganda and Tanzania. He was in charge of the fixed assets of the Respondent on a salary of Kshs.230, 000.00 per month. The Respondent was happy with him since he was performing exceptionally well, he got a bonus for 2010 and there is good reason for claim the bonus due in 2012.

7. On 30th March 2012, he was told that there was redundancy following systems change in the accounts department and globally the Respondent had a new system change and staff would be redeployed in which process the Claimant would be terminated. When the systems changed there was notice and new jobs would be advertised on 30th August 2013. This was not done but Respondent had staff redeployed. In September 2012 the Claimant was sent to Ghana to help with the new systems change and when he came back he realised that his colleagues had been redeployed. He was given clerical jobs in the accounts department. He asked his supervisor about it and was told that other opportunities may arise in other departments. On 30th March 2012 he was called to the boardroom and informed that he had been terminated on grounds of a redundancy. At the boardroom, others present included the department director, the Human Resource Manager and his supervisor Mr Gakure Anthony.

8. The Claimant also testified that before his termination he had no notice of the redundancy process. He had information about decentralisation of services and an advertisement was to be given but this was not done. There was an earlier advertisement that was posted, but by then the Claimant still had his job and had not been terminated. By July 2012, his job was not an issue and had no reason to apply for any other job. The jobs advertised were in finance Group “J” and his groups were the same and therefore had no reason to apply for a similar job. The practice of the Respondent was that when there were vacancies, they would be internal circulated to all staff and copied to site supervisors and managers. When the closing date came on 31st July 2012, the Claimant did not apply as he was in employment. He was therefore told to hand over by 2nd November 2012. He was later called to sign for his terminal dues on 21st November 2012 comprising;

- a. Notice pay
- b. Leave days due; and
- c. Severance pay

9. Notice pay at group “J” was 3 months’ salary. In his job groups he was entitled to a car allowance that was not given; 2 days for November were not paid for; relocation allowance was due as under the Collective Bargaining Agreement (CBA) at 50,000.00; and house allowance was not paid as this was not included in the salary. Bonus pay is due for 2012. When the Claimant left, other employees were paid a bonus and were thus entitled to it and his rate was 20% at group “J”. He is also seeking his bonus due in 2010 while he was at group “K” as well as compensation for unfair termination on non-existent redundancy. Certificate of Service was not issued. Severance pay was settled at 30 days’ pay for each year work. This claim is abandoned.

Respondent’s case

10. In defence the Respondent stated that they had employed the Claimant and he was terminated upon due process. While in employment, the Claimant was issued with a written contract with his terms and conditions of service which he accepted and thus applied. All the benefits due to the Claimant were awarded without violation of the law. In the Respondent business Mr Garth Knott holds the Chief Financial Officer position and not that of Senior Finance manager and the Claimant was placed under him for 10 years without complaints.

11. The Respondent also stated that in the termination of the claimant, they acted lawfully, the Sun Accounting System that the Respondent was using and where the Claimant fell were changed to

Integrated Accounting Systems and together with 14 others, the Claimant was affected. All employees were informed of these changes and advised on what to do on 13th July 2013. The claimants received formal notices of changes and advised to apply for alternative vacancies which had been advertised internally. Applications were received save from the Claimant and by 31st July 2012 the Respondent noted that the Claimant had not applied. When he was called for a discussion the Claimant stated that he did not see any position suited for his skills and that he would not apply. A follow up meeting was held to ask the Claimant to reconsider his position and to avoid a redundancy but he opted to be paid instead of being redeployed.

12. The Claimant was paid his redundancy package with 3 months' notice pay; severance pay; and all leave days due. Bonus is awarded subject to good performance and at the discretion of the respondent. The certificate of service has since been issued waiting collection by the claimant. The law was adhered to with regard to the termination of the Claimant and the suit is filed in bad faith and should be dismissed.

13. In evidence, the Respondent called Samuel Gakure who works in Accounts with the Respondent and was in the same department as the claimant. The Claimant left the employment of the Respondent on 2nd November 2012 after a redundancy following changes and business restructuring. There was notice to the process and over this, 3 months' pay for notice was paid including leave due; severance pay and salary for days worked all at Kshs.1, 785,623.90. On 13th July 2012 the Respondent sent an email to all staff indicating the vacant positions. The Claimant did not apply. Those who applied were taken and redeployed. The Respondent held meetings and did letters to make the Claimant aware but he still refused to apply and cannot claim discrimination against him by the respondent.

14. The witness also testified that the Claimant had a consolidated pay and cannot claim house allowance separately. Bonuses were at the discretion of the Respondent and there was no unfair process in the termination and general damages for emoluments are not justified.

Submissions

15. The Claimant submitted that redundancies are regulated by section 40 of the Employment Act to which the Respondent failed to comply with in this case. Failure to comply made the resultant termination illegal and unfair. Even where the Respondent was aware of the restricting need there was no notice issued to the Claimant one month in advance or a personal notice issued to him or provided with the criteria to be used. The reasons for termination were not given to the claimant. In this case the Claimant facilitated a transition process in Kenya and then left for Ghana to assist in a similar process while he waited to jobs to be advertised internally. However, at the point of termination, no jobs had been advertised and those that were, had been advertised prior to the Claimant being told of the restructuring process. The process was flawed and thus illegal. The Claimant relied on **Aviation and Allied Workers Union versus Kenya Airways Limited et al [2012] eKLR**.

16. The Claimant is seeking to be reinstated as his termination was illegal. In the alternative, he is seeking compensation under section 49 of the Employment act for 12 months and claims outlined in the claim. Lost income should also be paid to date since 2nd November 2012. Payments for house allowances are due as these were not paid with the due salary as this was basic. 2 days worked in November 2012 were not paid for. Bonus is due as this arose before termination. Relocation allowance is due to enable the Claimant move after his termination.

17. The Respondent on their part submitted that there existed good grounds for termination of the Claimant following a restructuring process. Notice was issued to the Claimant in July 2012 and his termination was on 2nd November 2012 which time gave the Respondent and the Claimant to discuss and look for options but the Claimant remained adamant that he wanted his redundancy package. The Claimant admitted that in July he was aware that staff in his department had been asked to apply for absorption in other departments which he failed to do. Together with other 20 employees, the Claimant was termination following the redundancy. He was paid all the terminal dues in accordance with section 40 of the Employment Act.

18. The Respondent also submitted that on 13th July 2012 the finance department was earmarked for restructuring, new positions were created where employees were advised to apply but the Claimant failed to apply. On 23rd July 2012 due notice was issued to the claimant. All due process was followed and there are no dues owing. The Claimant for house allowance has no justification as the Claimant had a consolidated salary covering all his benefits. Bonus, compensation and damages are not justified in this case. The case should be dismissed with costs. The Respondent relied on the case of **Judy Njoki versus DHL Excel Chain (K) Limited, Cause No. 713 of 2012.**

Determination of the issues

Whether there was unfair redundancy;

Whether remedies are due

19. The Claims for severance pay and notice pay have since been abandoned.

20. Pending claims include;

- a. Salary for the 2 days worked in November 2012 at Kshs.25,568.90;
- b. Accrued house allowance in arrears all being Kshs.2,788,416.00;
- c. Relocation allowance Kshs.50,000.00;
- d. Bonus pay Kshs.772,181.40;
- e. 12 months compensation Kshs.4,523,318.40; and
- f. General damages at Kshs.9, 154,083.40

21. The process of redundancy is a very sensitive process. This is a situation where, due to no fault of the employee, termination has to occur as the employer has to address the business realities due to cash flow, reduced work, changes in technology or work environment and out of it, employees lose their jobs. it is the desire of every employee to offer their labour and to remain in employment until end of their contract of retirement and when they have to lose such employment due to operational reasons, section 40 of the Employment Act, lays the grounds and modalities of how such an eventuality is to be addressed so as to have the necessary legal force as held in **Hesbon Ngaruiya Waigi versus Equatorial Commercial Bank Limited, Cause No. 60 of 2013.** This is also reaffirmed in the decision of **Banking, Insurance and Finance Union (Kenya) versus Murata Sacco Society Limited** where the Court held;

Thus reading the applicable law together with jurisprudence on how a redundancy should be undertaken, conducted and or processed; it involves the existence of genuine business reasons that require consultations, development of a pre-set criteria looking at seniority of affected staff; skill, ability, reliability and the class of each employee before arriving at the decision to terminate. Such a process must involve the Union without disadvantaging employees not Unionised and of importance, the Labour Officer responsible for the area where the Respondent employer is situate must be informed and involved. The Labour Officer is the government representative, neutral in the redundancy process to advice both the employer and employees on the applicable law and adherence to best practice especially as regards the set criteria. The inclusion of the Union where applicable and the Labour Officer is not optional; the law is framed in mandatory terms. Any resultant redundancy process without compliance with the law is unprocedural and a breach to the employment contract. Such breach where pleaded is curable by payment of damages.

22. These steps as outlined under section 40 and given emphasis in the jurisprudence of the court are important. In this case, the Respondent state that they made a decision to restructure their business and informed all the employees to apply for available jobs. The Claimant indeed facilitated the accounting systems change in his office and once done proceeded to Ghana to facilitate the same process.

23. The process in a restricting is crucial. With it, affected employees are able to come to terms with their circumstances and without it, tension and challenge are bound to happen. In this case, the process

seems to have started with the respondent's letter dated 23rd July 2012 that notes;

Dear Raphael,

RE: DECENTRALIZATION OF FINANCE – SHARED SERVICE

We refer to the various meetings held in forums with Garth Knott, Derrick Soanes, Estelle Viviers Decimer Ngula and myself regarding the decentralization of the Finance Shared Services department in Nairobi.

As already advised, following the implementation of the Oracle Financial Management System in the business, most of the roles currently handled in the finance – shared services department will be handled in the respective countries.

Some of the roles' contents are also changing due to the introduction of the system.

Due to the change, there is a restructure of the finance function across the business to accommodate these roles in country, and in the end result in that Finance Shared Services will cease to exist at the end of the transition period, which is envisaged to be at the end of September.

... All Kenya based vacancies as well as vacancies in other countries where there is a possibility to recruit another nationality will be advertised internally and we encourage you to apply. ...

24. The process prior to this notice is not indicated. A redundancy process cannot just affect one employee. There is no record of the others taken through a similar process. The record of 20 employees who were terminated is not attached. Even where the Respondent felt that there existed a genuine business reason to restructure and introduce a new accounting system that was going to affect the shared services department, consultations prior to the issuance of notices to the affected employees is imperative. Where the Respondent notes that they had had prior meetings and discussions with the Claimant on the matters, evidence of such consultations is lacking and this has been contested by the claimant. The Respondent was therefore left with the responsibility to prove such consultations took place and not just with the Claimant but for all the affected employees. Even where the entire finance department was to be affected, consultations with the employees serving in the department is crucial in a redundancy as the implications and the pre-set criteria was going to affect their functions. Even where the Respondent complied with these requirements of informing and meeting with the claimant, the process of redundancy such as this one that affected over 20 employees of the Respondent is required to be reported to the Labour Officer as held in **David Matevu and 103 Others versus Africa Nazarene University, Cause No.2286 of 2012.**

25. Where the provisions outlined under section 40 of the Employment Act are not followed, which provisions are couched in mandatory terms, the resultant outcomes ends in an unfair termination. With the flaws analysed in the Respondent process of terminating the claimant, the termination of the Claimant became unfair.

Remedies

26. The Claimant is seeking compensation for unfair declaration of redundancy. On the finding that the process undertaken and ending in the termination of the Claimant was flawed, compensation is due. I take notice that despite the flawed process the Claimant was given time to elect a deployment by putting in his application on the available jobs but declined on the basis that none of the offered positions was at his level or grade "J". This is contrary to that spirit of redundancy that allows an employer undertaking restructuring and has to lay off some employees, once there are new vacancies to first give consideration to such employees. Where the Claimant felt senior not to take the offered jobs, this cannot be visited upon the employer. I also take into consideration the fact that the terminal due upon termination were paid immediately especially leave days due, severance pay at a considerably good rate beyond the level minimum. Notice pay awarded was equally generous and beyond the legal minimum. A compensation of

one month's salary herein is appropriate and adequate. I award Kshs.230, 786.00 in compensation.

27. The claim for salary for 2 days worked in November 2012. This is on the basis that there was no such payment. In the payment transmitted to the claimant's account on 23rd November 2012, the dues paid included;

Three (3) months in lieu of notice

Salary for the days worked

Leave days owed to you are of the date of this letter [2nd November 2012]

Severance pay

28. These dues all amounted to Kshs.1, 785,623.90 and included pay for days worked and leave due up and until the 2nd November 2012. However in the respondent's breakdown of the items of payment at annexure 11 to the Statement of Defence it is listed as;

- a. *Notice pay for 3 months - Kshs.692,358.00*
- b. *Leave pending at 53 days – 489,266.32*
- c. *Severance pay for 10 years – Kshs.2,307,860.00*

Gross at Kshs.3, 489,484.32

Less PAYE

Less loan balance

Sacco loan

Total payable Kshs.1, 703,860.40

29. These payments do not include pay for 2 days worked in November 2012. This shall be granted at Kshs.15, 385.70.

30. The claim for housing allowance is outlined as amounting to kshs.2, 788,416.00. The basis for the claim is that the Claimant only got his basic pay exclusive of the house allowance. I find from the contract of service given to the Claimant that he acknowledged, his salary was included and all terms and conditions of his service agreed upon. The agreed terms were not in exclusion of the house allowance. The letter of appointment was emphatic that the salary awarded was *a consolidated amount*. In a contract of service agreed upon the parties as such, I find no basis to claim other benefits that were not agreed upon. The claim for housing or house allowance is declined.

31. Relocation allowance is claimed at Kshs.50, 000.00. The basis for this claim is that there was a collective agreement. The Claimant admitted he was not unionised. The Claimant was on a specific contract of service with agreed upon terms; the benefit of relocation allowance was not added or included in his contract. This shall not be awarded.

32. Bonuses awarded while in employment, are discretionary. It is not a right that can be pursued as herein unless it was already allocated and the Claimant informed as in letters dated 1st April 2009 and 20th April 2010. This claim is declined.

33. I find no evidence to support the claim for general damages. Though claimed, the basis for the same is not outlined in view of the compensation already claimed and awarded herein.

Conclusion

In conclusion therefore, judgement is entered for the Claimant in the following terms;

- a. The termination on account of redundancy was unfair**
- b. Compensation awarded at kshs.230,786.00;**
- c. Pay for 2 days worked in November 2012 at kshs.15, 385.70;**
- d. Certificate of Service be issued unconditionally within 7 days from the date hereof and where the Claimant is not able to collect it personally, the same be sent to his last known postal address on the 14th day hereof; and**
- e. Monies payable as above (b) and (c) is subject to the provisions of section 49(2) of the Employment Act.**
- f. Claimant awarded 50% of his costs.**

Delivered in open Court dated and signed in Nairobi on this 25th day of May 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant