



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

CAUSE NO. 195 OF 2013

DAVID OMEGA MWASIAJI

CLAIMANT

v

KARUTURI LTD

1st RESPONDENT

RECEIVER MANAGER, KARUTURI LTD

(under receivership/statutory management

2nd RESPONDENT

JUDGMENT

1. David Omega Mwasiagi (Claimant) commenced legal proceedings against Karuturi Ltd (1st Respondent) on 25 June 2013 alleging unlawful termination of employment through redundancy.
2. Notice of Summons was served upon the 1st Respondent on 15 July 2013, and it acknowledged service. Consequently, the firm of Kiprop & Co. Advocates entered appearance for the 1st Respondent on 26 July 2013 and filed a Response on 3 October 2013.
3. On 21 July 2014, the Claimant sought, and Ongaya J granted him leave on 30 July 2014 to amend the Memorandum of Claim by joining the Statutory/Receiver Manager of Karuturi Ltd as a Respondent (2nd Respondent).
4. The 2nd Respondent was served with the orders enjoining it to the proceedings (there are affidavits of service filed on 30 July 2014 and 19 September 2014) but instead of filing appropriate papers, they instead wrote to the Claimant on 19 September 2014.
5. On 1 October 2014, the Court directed the Claimant to serve a mention notice upon the Respondents with a return date of 13 October 2014.
6. When the Cause was called out on 13 October 2014, the Court fixed it for hearing on 22 April 2015. The Claimant was directed to serve a hearing notice upon the Respondents.
7. On 22 April 2015, when the suit was called for hearing the Respondents and their counsel were absent. Mr. Kamwaro for the Claimant informed the Court that he had served hearing notices and that an affidavit of service had been filed.
8. On record was an affidavit of service sworn by David K Githua deposing that the Respondents Advocate had accepted and acknowledged service. A copy of a stamped hearing notice was annexed to the affidavit. Being satisfied with the service, the Court allowed the hearing to proceed.
9. The Court was informed and the record bears that the Claimant and Respondents Advocates entered a consent judgment in terms of paragraph 12(a)-(e) of the Memorandum of Claim.
10. The only issue therefore outstanding for determination is whether the termination of the Claimant's employment through redundancy was unfair and if so, appropriate compensation.

Whether termination of employment through redundancy was unfair

- 11.The Claimant testified. He stated that sometime in 2013 while on leave he got a call from the 1st Respondent's Deputy Managing Director asking him to go and collect a letter.
- 12.The Claimant stated that after finishing his leave, he collected the letter dated 5 April 2013, and found that it was a letter giving him one month notice of the termination of his employment. The reason given in the letter was restructuring/redundancy.
- 13.The Claimant testified that there was no actual redundancy because he was the only one whose employment was terminated and that thereafter, the 1st Respondent hired doctors on a consultancy basis.
- 14.He contended that the termination of employment through redundancy was malicious and unprocedural as there were no consultations.
- 15.He further stated that he had not been paid the dues outlined in the termination of employment letter.

Evaluation

- 16.Termination of employment through redundancy is governed by section 40 of the Employment Act, 2007. The said section has provided about 7 conditions an employer should comply with when terminating the services of an employee on the ground of redundancy.
- 17.Out of the conditions applicable to non union employees such as the Claimant herein, there is no indication that the Respondent informed the local labour officer of the intended redundancy and the reasons and extent thereof.
- 18.Further, the Respondents did not appear during the hearing and therefore there is no indication of the selection criteria which was used to send off the Claimant.
- 19.Section 45(2)(b)(ii) of the Employment Act, 2007 also puts an obligation upon an employer to prove that a redundancy is based on its operational requirements and that the reasons are valid and fair.
- 20.Because the Respondents failed to appear at the hearing, the only conclusion the Court can reach is that the termination of the Claimant's employment through redundancy was both procedurally and substantively unfair.

Appropriate remedies

Salary for One Month notice period

- 21.The parties agreed this head of claim at Kshs 315,640/50.

Severance pay

- 22.On this head of claim, the parties agreed Kshs 1,748,373/-.

Leave earned

- 23.On leave, judgment was entered in the sum of Kshs 176,413/-.

Balance of leave days

- 24.An amount of Kshs 73,650/- was agreed.

Salary up to 4 May 2013

- 25.Kshs 41,509/- was agreed.

Compensation

- 26.This head of relief was left for the Court's determination. The Court has reached a conclusion that the termination of the Claimant's employment was unfair. He is therefore entitled to

- compensation.
27. Compensation is a primary though discretionary remedy. The Court's discretion is fettered by the factors set out in section 49(4) of the Employment Act, 2007.
28. The Claimant served the Respondents for about 9 years. The Respondent agreed to pay severance pay. Further, the Claimant secured alternative employment after about 2 months.
29. Considering these factors, the Court would award the Claimant the equivalent of 5 months gross wages assessed as Kshs 1,578,202/50 (based on the gross wage of Kshs 415,640/50 in the letter of 4 December 2010, exh. 4).

Conclusion and Orders

30. The Court finds and holds that the termination of the Claimant's employment through redundancy was unfair and awards him and orders the Respondents to pay him

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|--------------------------------------|-------------------|
| a. One month notice period | Kshs 315,640/50 |
| b. Severance pay | Kshs 1,748,373/- |
| c. Leave earned | Kshs 176,413/- |
| d. Balance leave days | Kshs 73,650/- |
| e. Salary up to 4 May 2013 | Kshs 41,509/- |
| f. 5 months gross wages compensation | Kshs 1,578,202/50 |

TOTAL **Kshs 3,933,788/-**

31. The Claimant to have costs.

Delivered, dated and signed in Nakuru on this 22nd day of May 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. ole Kamwaro instructed by Kemboy & Co. Advocates

For Respondents Kiprop & Co. Advocates (did not appear at hearing)

Nixon Court Assistant