



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1077 OF 2011**

**(Before Hon. Justice Hellen S. Wasilwa on 5<sup>th</sup> May, 2015)**

ISAIAH EYAHONGA ESHIKATI .....CLAIMANT

**VERSUS**

SOCIAL SERVICES LEAGUE, MP SHAH HOSPITAL.....RESPONDENT

**JUDGMENT OF THE COURT**

1. The Claimant herein filed his Memorandum of Claim on 4<sup>th</sup> July 2011 through the firm of Miller & Company Advocates. His claim concerns wrongful/unfair and illegal dismissal or redundancy and refusal to pay terminal dues and damages.

**Claimant's case**

2. Through his Memorandum of Claim and by oral evidence adduced in court, the Claimant avers that he was employed by the Respondent on 2/5/1997 as a Credit Officer as per his appointment letter Appendix 9 attached to his Memorandum of Claim. His starting salary was 7,500/=. He contends that he worked for Respondent for 14 years until 15/3/2011 having risen to the rank of Deputy Chief Accountant with a correspondence basic salary of 111,400/=. At the time, the Claimant avers that he felt motivated to do his work and had the requisite qualifications including a Bachelors Degree in Finance, CPA and was undertaking a Masters Degree in Strategic Management. The Respondent never expressed any dissatisfaction to his performance and he never received any warning letters.

3. The Claimant further avers that as part of his benefits, he was entitled to free outpatient treatment at Respondents hospital but for his dependents it was 25% of cost. For inpatient it was 25% for employee and 75% for the dependents. In his case however, the Claimant told court that he was admitted 2 times and incurred a bill as per Appendix at page 77 of his claim transaction Nos. 006167 and No. 006179 for Ksh.111,716.25 and 77,630.25 respectively.

4. He is making a claim for medical refund because the 1<sup>st</sup> time he was admitted, he stayed in hospital for 3 days. He then went home and the illness reoccurred and the specialist recommended that he be treated at Aga Khan hospital where he spend Kshs.377,540/= (Appendix 10). MP Shah was obliged to pay this money as they had even asked for estimates and were given at page 90.

At Aga Khan, the specialist recommended that he be treated at Bombay where he incurred, Kshs.1,703,624/= and travel costs of Kshs.119,470/= which cash he raised through fundraising. He avers that even for Bombay, the Respondents were to pay 75% of his cost.

5. On 15/3/2011, the Respondent avers that his services were terminated. The reasons for his termination as advanced were restructuring and the position of Deputy Chief Accountant was abolished. He was told to pick his dues at the HRM office. It is his contention that the position was scrapped but a new Senior Accountant was employed and this position conflicted with his duties.

6. His prayers are for payment of dues amounting to over 7 million as per his claim.

In cross examination, the Claimant stated that initially the medical claim had a ceiling of 100,000/= but it was changed to 75% for employee. He didn't produce any evidence of this change. He also agreed that there was no request for estimates of the bill from the Respondents.

He further stated that he never asked for transfer to Aga Khan Hospital and his expectation was that the Respondents were to pay his bills.

### **The Respondent's Case**

7. The Respondents on their part filed their Memorandum of Defence on 26/8/2011 through the Federation of Kenya Employers and a Supplementary Memorandum of Defence on 17<sup>th</sup> September 2012 through the same Federation of Kenya Employers.

It is their position that the Claimant was employed on 2/5/1997 and left on 14/3/2011 on grounds of redundancy. It is further their defence that the Claimant's salary at time of exiting was 101,400/= per month consolidated pay. They aver that notice of this redundancy was communicated to the Ministry of Labour as per Appendix 2 (Respondents documents). The notice was to take effect on 14/3/2011, the same day the Respondents aver the Claimant resigned to pursue further studies as per his Appendix 3. On the same day 14/3/2011 as per Appendix 4 the Claimant was declared redundant and his terminal dues amounting to Kshs.771,008/= was paid out to him on 15/3/2011. He was also issued with a Certificate of Service as per Appendix 8.

8. On payment of medical expenses reimbursement, the Respondents aver that this was not payable as the ceiling was 100,000/= annually as per Appendix 10 and 10A.

### **Issues of determination**

9. Upon considering the evidence of both parties and their submissions therein, the issues for determination are as follows:

(1) ***Whether the Claimant was declared redundant and if***

***so;***

(2) ***Whether due procedure was followed;***

(3) ***Whether the Claimant is entitled to medical expenses***

***reimbursement sought and if so;***

(4) ***To what extent.***

10. On the 1<sup>st</sup> issue, vide a letter dated 14/3/2011, Appendix 15 the Respondents wrote to the Claimant as follows:-

***“Mr Isaiah Eyahonga***

***P.No. 2103***

14<sup>th</sup> March 2011

**RE: HOSPITAL STRUCTURAL RE-ORGANIZATION**

*As you are aware, from previous communications and meetings the Hospital is undergoing structural re-organization to enable us to meet the significant growth in the Healthcare Industry over the past few years and the Management has been diligently working on redesigning the organization structure.*

*Our guiding goal in this regard has been to ensure that we are structured in a manner so as to be able to effectively support the Hospital mission, vision and strategic mandates.*

*In view of the above, it is necessary that the Hospital reviews the staff criteria of some of the departments, finance being one of them. The Management after considerable deliberation has decided that they only require certain positions in this department.*

*The new criteria set out will bring the Hospital structure in line with the strategic requirements. We therefore regret to inform you that your position is no longer required.*

*You will hereby be paid your dues as follows:*

- a. Pay in lieu of notice*
- b. Salary up to and including the last day of which your services end*
- c. Any accrued unutilized leave days*
- d. Severance pay at the rate of 15 days pay for each completed year of service.*

*We would like to thank you for your commitment to the work of MP Shah Hospital and wish you continued success as you seek future career direction.*

*Yours faithfully,*

*Signed*

*Afshan Magre Lalji*

*Chief Executive Officer*

11. From the wording of this letter, the Claimant was declared redundant due to the restructuring programme. On the same day the Claimant had written to the Respondent Appendix 14 where he wrote as follows:

*“-----I have no option but to take this study leave in order to concentrate and finish up before the change of syllabus. It will be highly appreciated if the management can consider giving me unpaid study leave for one year-----“.*

12. This request was rejected by the Respondent vide their letter dated 14/3/2011 Appendix 5 where they stated:-

*“we refer to your letter of resignation dated 14/3/2011. We request that we cannot grant you permission for one year unpaid leave for you to pursue your studies. We are however happy to accept your resignation, to pay all your dues and allow you to further your studies-----“.*

13. The assertion by Respondent that Claimant resigned does not flow with the above communication and what emerges is that indeed the Claimant was declared redundant.

Under Section 40(1) of Employment Act:

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

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

**(f) 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**

**(g) 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.**

14. In the case of the Claimant he was informed of the redundancy on 14/3/2011 and notice to that effect was not given to him as expected under Section 40(1)(f) above. The Labour Officer was informed vide a letter of 14/2/2011 which letter does not conform to provisions of Section 40(1) (b) which envisages that this notice must be served simultaneously on the employer and the Labour Officer. In this case, the Respondent failed to give the requisite notice to the Claimant hence his quest for the 1 months notice fees which is different from what is expected under Section 40(1)(f) of Employment Act.

Because this notice was not given, I grant the Claimant 1 month salary in lieu of notice equivalent to Kshs.101,400/=. From the pay slip of Respondent for January 2011, the 101,400/= was his basic pay without any allowances.

15. In answer to the 2<sup>nd</sup> issue, I find that due process was not followed in the redundancy as explained above.

16. In relation to the 3<sup>rd</sup> issues, from the evidence adduced medical reimbursement was payable upto a maximum of 100,000/=. The Claimant had submitted that it was upto 75% of cost. This contention is not supported by any evidence whatsoever. Appendix 10 of Respondents documents dated 11/2/1998 provides as follows:

***“Effective 1<sup>st</sup> March 1990, the league shall provide medical treatment at the rate of 25%***

*employees participation in outpatient and 50% inpatient subject to a ceiling of Kshs.100,000/= per annum, per family-----“.*

This is clear that the ceiling was 100,000/= and therefore the claim for medical reimbursement over and above the amount paid is not tenable.

I therefore find the claim of Claimant proved only to the extent that notice for redundancy was not give and I therefore award him 1 months salary for the notice = **101,400/=**.

I also award him 12 months salary for the unfair redundancy

$$= 101,400 \times 12 = 1,216,800/=$$

$$\text{Total} = \mathbf{1,318,200/=}$$

Respondent will met costs of this case.

Dated and delivered in open Court this 5<sup>th</sup> May, 2015.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Makasila for Claimant

No appearance for Respondent