



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2258 OF 2012

JOHN NGOWAH..... CLAIMANT

VERSUS

EAST AFRICA SAFARI AIR EXPRESS LIMITED RESPONDENT

JUDGEMENT

1. The issues in dispute herein are -The payment for unlawful termination; non-payment of terminal dues; severance pay; notice pay; service pay; bonus payments and salaries due until retirement.

2. The claimant's case is that on 1st august 2002 he was employed by the Respondent as an Accounts Clerk (Data Processing) at a basic salary of Kshs.15, 000.00 per month together with other benefits. The employment was confirmed on 30th June 2003. The Claimant was diligent in his work and had a good record that saw his salary increased to Kshs.21, 850.00 and a monthly bonus of Kshs.2, 850.00. On 20th December 2010 the Claimant was served with a letter of termination effective the same date. The Claimant made effort to keep his employment but the Respondent was adamant. The termination was contrary to the rules of natural justice and in breach of his employment contract. The Claimant is seeking for a declaration that his termination was unprocedural and unlawful and that he should be paid his terminal dues of severance pay; notice pay; service pay; bonus payments; salaries until retirement and costs of the suit.

3. In evidence the Claimant testified that he was employed by Eagle Aviation Limited on 1st august 2002 which later changed to the Respondent East Africa (EA) Safari Air Express Limited on 30th June 2003. The Claimant was issued with a new letter of appointment. His salary changed to 21,850.00 together with bonuses at kshs.2, 850.00. He was however terminated on 20th December 2010 on the grounds that the r4espondnt was experiencing high operational costs and thus declared redundant his position. The Claimant was told to leave immediately and that he would be paid in 90 days but this was never paid.

4. The Claimant also testified that he was not given notice or informed of the reasons for termination in advance and the date of termination was immediate. This was unprocedural and unfair and the Claimant thus confirmed his outlined claims.

The Claimant contested the defence noting that he was issued with a first warning on the basis that his work was poor which was not the case as he was allocated more duties after a colleague left the Respondent and he was made to do his work and also of the person who had left as the Respondent refused to hire somebody to replace. Mr Dan Onyango was the person in charge of manifests entries, he left the Respondent and joined a new company and was not replaced. The Claimant was thus made to complete his duties in cash sales and they do the work that Dan onyango was supposed to have done. In

dealing with the backlogs he was accused of neglecting his work.

5. In cross-examination the Claimant could not **explain his claim for kshs.218, 500.00 which he withdrew**. He was entitled to two months' notice or such pay based on his contract and service pay for 10 years since he had served that long and not 8 years. He confirmed that he was registered with NSSf and NHIF and all his dues were remitted. He was given the reason for termination as due to operational costs which amounted to a declaration of redundancy and he is thus entitled to severance pay. He was entitled to bonus payments as this was given with his salary. **He withdrew claim for salaries until retirement.**

6. In defence the Claimant breached his contract of employment and was cited for poor performance on 29th October 2009 and was issued with a warning letter on 31st October 2007. Bonus was payable upon the Claimant meeting the required performance and this was not available upon poor performance. The termination was lawful and justified in this case. The prayers sought in the claim are not available in law and cannot be awarded to the Claimant as they have no basis. On 20th December 2010 the Claimant was given reasons for his termination which he acknowledged and thus cannot claim for unfair termination, service pay, bonuses or anything else that was not lawfully due to him.

7. In evidence the Respondent called George Kivindyo the Chief Executive officer of the Respondent as their sole witness. He stated that he commenced working with the Claimant on 30th June 2003 when he was employed by the Respondent as the Data Account Clerk. The Claimant last salary was kshs.21, 850.00 per month and a bonus of kshs.2, 850.00 based on productivity and good performance. The Respondent was not doing well and the bonus should have been withdrawn. Initially the Claimant was employed by Eagle Aviation Limited a different company from the Respondent which collapsed and the Respondent took over its assets. This was not a change of name but a new company. The company could not trade and the Respondent thus took over its staff and assets. The Claimant was issued with a new employment contract.

8. The witness also testified that in December 2010 the Respondent decided to lay off staff as it had problems in trading and took options to trim sales and get new investors. Trading was poor and a decision was taken to lay off employees to avoid going under. The Respondent needed 90 days to see if there could be a new investor to help. The Claimant did not wait for the 90 days as he sourced and advocate and filed suit. The Respondent was then forced to stop processing the terminal dues due to the ongoing case in court. The termination was not unprocedural as the law was clear. The Claimant was in finance department and his performance was questionable and he was not a team player. He was issued with warnings and failed to change.

9. The witness also testified that they were willing to pay for notice but the Claimant filed the claim in court and refused to wait. This claim is due. Service pay is not due as the Claimant was registered with NSSF and NHIF. The Claimant was not declared redundant and hence service pay is not due. Redundancy procedures were not carried out and this was a normal termination. Where the Respondent is back on its feet, the Claimant was a good employee and can be recalled.

Submissions

10. In submissions, the Claimant stated that the termination of the Claimant was unprocedural and unlawful as his contract of employment made provision for notice prior to termination that was not issued as held in **Mary Chemweno Kiptui versus Kenya Pipeline Co. Ltd [2014] eKLR**. Where an employer has a valid for termination, the employee must be taken through the process of hearing as under section 41 of the employment Act and where an employer is going through a business challenge such as reorganisation of redundancy; such an employer must follow the provisions of section 40 of the Employment Act. In this case the Claimant was only informed that the Respondent was facing financial problems and was laid off immediately without prior notice or the application of due process which was unfair.

11. The Claimant also submitted that he is entitled to his outlined claims and terminal benefits of kshs.218, 500.00; notice pay of two months, service pay and severance pay together with damages for

unlawful termination. It is clear that the Claimant was retrenched and is entitled to redundancy dues as held in a similar case of **Josephine Muthoni Kamau and 5 Others versus East Africa Safari Air Express Limited [2013] eKLR.**

12. The Respondent on their part submitted that under section 43(2) of the Employment Act, the Respondent gave the Claimant the reasons for termination which reasons were valid and fair and thus he cannot claim anything in unfair termination. The Respondent was experiencing operational challenges and despite efforts to address it there was no financial improvement. The Claimant was thus notified of the position of the Respondent and was to be paid his terminal dues. These operational problems led to the termination of the claimant. This was a valid reason that justified the termination. No compensation is therefore due once an employer has established a valid reason for termination. Section 41 and 40 does not apply in this case as this was not a case for hearing or retrenchment once the reason for termination had been established.

13. The Respondent also submitted that the Claimant was to be paid his notice but referred the matter to court before this could be paid. This is admitted as due. Service pay is not due as the Claimant was registered with NSSF and NHIF. Bonus payment were payable on good performance which was not the case for the Claimant and thus not due. Claim for salaries until retirement has been withdrawn as this was not justified. The Respondent relied on the case of **Josephine Muthoni Kamau and 5 Others versus East Africa Safari Air Express Limited, Cause No. 353 of 2011** which case has similar circumstances as this case.

Determination

Who was the employer?

Whether the Claimant was unfairly terminated;

Whether there are any remedies

14. The claims dues amounting to Kshs.218, 500.00 were withdrawn. Equally the Claimant for salaries due until retirement was lost withdrawn. These shall not be considered.

15. The Respondent admitted owing notice pay as this was not issued. That the Claimant should have been paid this amount but he filed the claim in court and the Respondent stopped the processing of the same.

6. On the question of who the employer of the Claimant was, I note claimant's annexure 1 which note that he was employed by Eagle Aviation limited on 1st August 2002 where he was appointed as the Accounts Clerk (Data Processing). Annexure 2 in another letter of appointment by East African Safari Air Express Limited in the position of Accounts Clerk. In annexure 2, the appointment commenced on 1st July 2003. Even though the terms in annexure 1 are similar to annexure 2 save for the employer, the employment is new and by a different entity. The Claimant has signed in acceptance to the new appointment with the Respondent at annexure 2 and dated the same on 18th July 2003. There is therefore no doubt as to who the employer was as from 1st July 2003 until termination of the claimant. This was the Respondent and not Eagle Aviation Limited. Whatever happened with Eagle Aviation limited employment is not well defined. The explanation by the Claimant that this was a change of name from one entity to the Respondent has no justification as a new letter of appointment was issued and the employed changed from Eagle Aviation Limited to the Respondent. Where the Claimant has any claims against the former employer, they should have both been joined in the suit but he cannot claim from the Respondent anything due before his employment that commenced on 1st July 2003.

17. I therefore find that the employer in this case was the Respondent and employment commenced on 1st July 2003 and not 1st August 2002.

18. On 20th December 2010 the Respondent issues the Claimant with a termination letter. The letter stated in part;

... We regret to inform you that your employment with East African Safari Air Express has been terminated W.E.F. 20/12/2010. This has been occasioned by the recent price wars on the main routes we have been operating and high operating costs. Despite our continued efforts, the company has not been able to perform and meet its financial obligations. ... Should the company's circumstances change, we shall of course give you first priority in relation to any recruitment plans in the future.

19. This then became the sole basis of the claimant's termination of his employment. The Claimant submitted that this was tantamount to being declared redundant while the Respondent contested that this was a termination on valid grounds and hence justified to do as they did.

20. In law, there are a few circumstances where an employer is allowed to lawfully effect termination of employment. Such circumstances relate to business challenges, reorganisation, restructuring or in a situation where an employer has to declare some position redundant due to business need. Such process is all recognised under the Employment Act as redundancy. This is well defined under section 2 of the Employment Act thus;

“redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;

21. Where an employer finds themselves in a situation that they cannot meet financial commitments, cannot support some employees due to business challenges or has to lay off staff so as to reduce costs, then as a business requirement, section 40 allow such an employer to legally terminate some employees, effect deployments or make changes to positions so as to be productive and remain in business. Such matters do not just arise overnight as financial problems must be noted through management and a decision taken as to how to address the same. Such decision may entail the layoff of staff of a simple down-sizing of staff. The Respondent witness Mr Kivindyo testified that the Respondent had been undergoing serious financial problems for a while, they were unable to meet their financial obligations and a decision was taken to the effect that new investors had to be sourced so as to keep the Respondent afloat. The witness was therefore clear that these financial challenges caused the termination of the Claimant which is well outline in his letter of termination. It cannot therefore be correct to state that the Claimant was a poor performer in his work and that is what led to his termination. This is simply not stated in his letter of termination. The reason for his termination is due to financial problems which are tantamount to a lay off as the Respondent could not meet its financial commitments.

22. I therefore find the Claimant was retrenched. The reason given in his letter of termination cannot be interpreted in any other way other than a retrenchment that is well defined in law.

23. Where an employer lay off staff, the mandatory provisions of section 40 must be adhered to as held by this court in the case of **Kenya union of Domestic Hotels Educational institutions and Hospital workers (KUDHEIHA) versus Aga Khan university Hospital Nairobi, Cause No. 815 of 2015;**

There is nothing wrong with an entity going through reorganization and declaring some positions redundant. Employers, companies, businesses and such entities reorganise periodically. It is a market requirement to reorganise. Once the right is thus exercised, before an employer can move further with regard to implementation of the management decision that is likely to affect employees as recognised herein, the applicable Collective Bargaining Agreement and the legal motions under section 40 comes into force.

24. In this case, by 20th December 2010 the Respondent had already taken a business decision that

they were operating poorly in airfare wars and had reduced business as a result and could not be able to meet its financial obligations. A management decision had thus been made. Such a decision is crucial as this was for the employer/Respondent to make. The decision to declare redundancy, reorganisation, retrenchment or layoffs is the prerogative of the employer as at that date of 20th December 2010, the Respondent genuinely believed there existed good grounds that had been preceded by a long assessment of operations, processes and structures. This was the essence in the decision in ***G N Hale & Son Ltd v Wellington etc. Caretakers etc. IUW [1991] 1 NZLR 151 (CA)***, the New Zealand Court of Appeal held;

... This Court must now make it clear that an employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall... The personal grievance provisions ... should not be treated as derogating from the rights of employers to make management decisions genuinely on such grounds. Nor could it be right for the Labour Court to substitute its own opinion as to the wisdom or the expediency of the employer's decision.

25. However, even where an employer enjoys the right to lay off staff, address a business need or retrench its employees, the same must adhere to applicable law. In this case, section 40 is relevant and the Respondent had the duty to follow the outlined procedures therein. Issue notice and give the Claimant a chance to know the reasons for his intended layoff well in advance before his eventual termination. Noting prevented the Respondent from addressing the requirements of law as under section 40 of the Employment Act, and such non-compliance has no justification under the provisions of section 43 or 45 of the Act. Section 40 provisions are mandatory and where not adhered to, the resulting termination is unlawful. In this case, the Claimant was not given a chance to know in advance that the Respondent was facing financial problems and even though he was in the accounts department, the duty was upon the Respondent to make the operational decision and ensure the Claimant was duly notified. Where the Claimant was of poor performance, nothing stopped the Respondent from addressing the same by following due process. In this case therefore the termination that was effected had no justification and it was unprocedural. This amounted to unfair termination under the provisions of section 45 of the Employment Act.

26. I therefore find the Claimant was unfairly declared redundant. He is entitled to the benefits of law in that regard as well as compensation.

Remedies

27. Notice due is admitted. The contract of employment made provision for two months' notice or payment in lieu of such notice. The Claimant was earning kshs.21, 850.00 as his monthly salary. The Claimant is therefore awarded kshs.43, 700.00.

28. Service pay is claimed on the grounds that the Claimant was in employment for 8 years and should be awarded 15 days' pay for each year in service. Service pay is regulated under section 35 of the Employment Act and due to an employee whose employer does not make the requisite remittances to the NSSF and NHIF as statutory dues in pension or provident funds as schemes regulated by the Retirement Benefits Act. From the annexed pay slips of the claimant, the Respondent made deductions and remittances are required under section 35(6) of the Employment Act and thus service pay is not due in this case. This is declined.

29. The Claimant is seeking severance pay. Upon the finding that the Claimant was unlawfully declared redundant, he is covered under section 40 of the Employment Act in service payment and section 49 in compensation. The Claimant was employed by the Respondent from 1st July 2003 to 20th December 2010. These were 8 complete years of service. Service pay is thus dues as under section 40(1) (g) for 15 days for each year all being Kshs. 87,400.00. This is awarded to the claimant.

30. The Claimant for kshs.218, 500.00 for terminal benefits and salaries due until retirement has since been abandoned. These shall therefore not be awarded.

31. Bonuses were claimed at Kshs.2, 850.00 per month. This was not outlined in the letter of employment but in a letter dated 23rd January 2006 the Respondent added this benefit in writing, noting the good work performance of the Claimant which was a 15% increase and addition to his salary. This is therefore a benefit recognised by the Respondent and is therefore due. Further on the finding that this was not a case of termination on the grounds of poor performance, such a benefit being based on good performance remained due and owing to the claimant. I therefore award the Claimant Kshs.5, 700.00 as claimed.

32. Compensation is due on the finding that this was a case of unfair redundancy. The Claimant is awarded 3 months' salary in compensation all being kshs.65, 550.00.

33. The Claimant is seeking costs and interest on the due amounts. Upon termination, the Claimant was advised to wait for 90 days for his terminal benefits to be paid. Section 40 requires that once an employee has been terminated due to redundancy, terminal dues are payable immediately and without delay as the employer must have foreseen the business challenges well in advance and ought to have been prepared for the termination eventuality. To therefore delay such payments by 90 days has not justification. The Claimant had legitimate claims and was justified to file his claims in court where his terminal dues had not been paid at the time of his termination. The fact that the respondents have held these dues since 2010, they have not closed business and have retained some staff, they ought to have cleared any due liabilities and particular the terminal dues owed to the Claimant without waiting for him to move the court as herein. Costs shall therefore be awarded herein.

Conclusion

Judgement is entered for the Claimant against the Respondent in the following terms;

- a. **The Claimant was unfairly terminated through a flawed redundancy process;**
- b. **The compensation awarded at kshs.65,550.00;**
- c. **Notice pay awarded at kshs.43,700.00;**
- d. **Bonus payment at kshs.5,700.00;**
- e. **Severance pay at Kshs.87,400.00;**
- f. **Costs of the suit;**
- g. **Interests on (c), (d) and (e) above at court rates.**

Delivered in open Court dated and signed in Nairobi on this 30th day of June 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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