



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 30 OF 2014

BETWEEN

KEVIN ZIRO POLECLAIMANT

VERSUS

ELSEK & ELSEK [K] LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Ms. Omollo Advocate instructed by Lamanya Katee & Associates Advocates for the Claimant

Jacqueline Kariuki & Associates Advocates for the Respondent absent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. Through the amended Statement of Claim filed on the 22nd May 2014, the Claimant states he was employed by the Respondent Company on 11th June 2012, as an EPS Machine Operator. He was paid a monthly salary of Kshs. 10,420. He claims his contract of employment was unfairly and unlawfully terminated. He was not given reasons for termination. He was not issued a notice of termination. He was denied overtime pay for excess hours worked during service; he was not paid house rent allowance; annual leave pay; and was not paid severance pay on exit. He seeks compensation and terminal dues totaling Kshs. 179,957, costs and interest.

2. The Respondent filed a Statement of Reply on 19th March 2014. It is conceded the Claimant was employed by the Respondent as stated in the Claim. He earned Kshs. 10,420 gross pay per month, which included the house rent allowance. He took his annual leave. His contract was not unlawfully or unfairly terminated; he left employment on redundancy, after the Respondent completed its Kikambala Housing Project in which it had employed the Claimant. He was paid his dues for days worked. His Claim for terminal dues and compensation is misconceived and without merit. The Respondent urges the Court to

reject the Claim with costs to the Respondent.

3. On 10th March 2015, Parties' Advocates fixed the dispute for hearing on the 1st July 2015. Ms. Onyango appeared for the Claimant on the hearing day. Neither the Respondent nor its Advocates attended Court. The Claimant testified in the absence of the Respondent.

4. He told the Court he is a construction Worker. He worked for the Respondent as a Machine Operator from 11th June 2012. The Respondent is a Construction Firm. It was engaged in preparation of building blocks. He was paid Kshs. 10,420 per month. He was issued a pay slip. He produced the pay slip for the month of June 2012. He worked Monday to Friday. On Saturday he worked half-day. He occasionally worked overtime, about twice a week, between 5.00 p.m. to 6.00 p.m. and between 12.30 to 4.30 p.m. on Saturdays. His contract was terminated on 24th July 2013. He and 2 other Employees in his department were told there was no more work. Their contracts were terminated. He was paid Kshs. 7,333 for days worked. He was paid nothing else. He seeks the assistance of the Court in terms of his prayers.

5. The Claimant submits that the Respondent admits to have been compelled to terminate the Claimant's contract on the ground of redundancy, after completion of the Kikambala Housing Project. The Respondent did not issue the Claimant notice of termination, or pay 1 month salary in lieu of notice as required under Section 36 of the Employment Act 2007. It only paid the Claimant Kshs. 7,333 for days worked. The redundancy did not conform to Section 40 of the Act, on notice to the Claimant and the Labour Office; pending annual leave days; and severance pay. Fair Procedure was disregarded. The Claimant submits he has established his case to the required standard.

The Court Finds:-

6. The Respondent agrees the Claimant was its Employee, working as a Machine Operator, at the Respondent's Kikambala Housing Project. He and 2 other Employees left employment on the 24th July 2013 on redundancy. The Respondent advised the Claimant there was no more work for him. The Respondent uses the term redundancy under paragraph 8 of its Reply.

7. Having conceded the presence of a redundancy situation, the Respondent ought to have followed the provisions of the redundancy law contained in Section 40 of the Employment Act. There was no suggestion by the Respondent that it adhered to any of these provisions. There was no evidence given by the Respondent of notice issued to the Claimant; consultation or explanation on the nature and extent of redundancy; computation and payment of the Claimant's pending annual leave days; advice on why the Claimant was selected for redundancy; and there was no engagement with the competent government officials in the Labour Ministry. The Claimant was merely told there is no more work, and, paid Kshs. 7,333 as his salary for days worked. This is not how termination on redundancy is supposed to work.

8. Consequently the Court is satisfied, in the absence of any evidence challenging what has been said by the Claimant, that termination was unfair. Procedure was unfair. The claim for compensation is merited, as are the claims for notice pay; house rent allowance; annual leave pay; and severance pay. The Court was not persuaded by the evidence of the Claimant on overtime pay. Paragraph 10 of the Amended Claim states the Claimant worked from Monday to Sundays, while the Claimant's own evidence was that he worked Monday to Friday, and sometimes half-day on Saturday. There was disparity between the Claimant's evidence and pleadings on overtime worked. The 347 hours allegedly worked in excess of the normal hours, has no evidential support.

IT IS ORDERED:-

[a] Termination on account of redundancy was unfair.

[b] The Respondent shall pay to the Claimant within 30 days of the delivery of this Award 1 month salary in lieu of notice at Kshs. 10,420; house rent allowance of Kshs. 20,319; annual leave pay at Kshs. 7,293; severance pay at 15 days' salary for 1 year of service at Kshs. 5,250; and 6 months' salary

in compensation for unfair termination at Kshs. 62,520- total Kshs. 105,802.

[c] Costs to the Claimant.

Dated and delivered at Mombasa this 25th day of September, 2015

James Rika

Judge