



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 351 OF 2014

PETER KAMAU KIARIE

CLAIMANT

v

KEROCHE BREWERIES LTD

RESPONDENT

JUDGMENT

1. The issue for determination in this Cause is straightforward as the parties are agreed that the employment of Peter Kamau Kiarie (Claimant) was terminated by Keroche Breweries Ltd (Respondent) on account of redundancy.
2. That issue is whether the Respondent complied with the provisions of section 40 of the Employment Act, 2007 and if it did not, appropriate remedies. The remedies would include any contractual and statutory entitlements on termination of employment through redundancy.
3. The Court has considered the written submissions and authorities filed by the Respondent.
4. The Respondent wrote to the Claimant on 14 May 2014 informing him that it had decided to abolish the position he occupied of security guard due to restructuring.
5. The letter further advised the Claimant that he would be paid salary for month of May 2014, Salary for 4 days upto 4 June 2014, one month salary in lieu of notice, accrued leave for 11 years (231 days less 28 days already taken in 2014 balance 203 days to pay) and severance pay equivalent to 15 days for each year for 11 years (165 days equivalent salary).
6. The Respondent had earlier, through a letter dated 6 May 2014 notified the local Labour Office of its intention to restructure and abolish some job positions.
7. The Claimant testified and stated that he was called to the office by the Respondent's Operations Manager on 4 June 2014 and issued with a termination of employment letter and that he was not given advance notice or copied in the letter written to the Labour Officer.
8. In cross examination, the Claimant denied that he declined to receive the letter of termination of employment in May 2014.
9. He therefore contended that the redundancy was unfair and unlawful.
10. The Respondent called its Human Resources Manager.
11. She stated that after receiving names of employees to be retrenched she sought out the Claimant and found that he was on leave. She therefore had him called and he came to see her on 13 May 2014 when she explained to him about the restructuring.
12. The Claimant went back on leave and reported back on 4 June 2014 when she issued him with the letter.
13. She also stated that she prepared a letter notifying the Labour Officer on 6 May 2014 and that the retrenchment was not unlawful or unfair.
14. Section 40 of the Employment Act, 2007 has outlined some 7 conditions an employer should comply with when declaring redundancy.
15. The relevant conditions in respect of the Claimant who was not a member of a Union were, *notification in writing one month in advance* (section 40(1)(b)); *consideration of seniority, skills,*

ability and reliability (section 40(1)(c); and *payment, of accrued leave if any, one month wage in lieu of notice and severance pay.*

16. The Respondent did not even suggest that the Claimant was given one month written notice of the intending redundancy. The meeting held on 13 May 2014 could not and does not satisfy the requirement for written notice one month in advance.
17. In any case the termination of employment letter was written the next day 14 May 2014 and if it were to meet the requirements, it should have been clear/unambiguous on the effective date of redundancy, which should have been 13 June 2014 and not around 4 June 2014 (up to when it calculated Claimant's wages). The notice if at all, was short of the statutory period. The Court notes that the letter to the Labour Officer was not the same one directed to the Claimant.
18. For this singular failure to comply, the Court reaches the conclusion that the termination of the Claimant's employment through redundancy was unlawful and unfair.
19. The Respondent's witness attempted to make much of an issue of Kshs 20,000/- which had been given to the Claimant by its Chairman to purchase puppies and for which he could not account for Kshs 10,000/-. That issue was a red herring as the case was not one of termination for misconduct, poor performance or physical incapacity.

Appropriate remedies

Accrued leave as at June 2014

20. The Claimant sought Kshs 188,385/- on account of leave. The Respondent had offered to pay him the equivalent of 203 leave days and computed the same as Kshs 42,000/-.
21. None of the parties explained the formula used to arrive at the inconsistent figures in the pleadings or hearing (the Respondent made an attempt to show the formula in the submissions and the divider was given as 30). This is not based on practice.
22. The calculation by the Respondent therefore cannot be correct. To get the cash equivalent of 203 days, the correct formula is to take the basic wage divided by 26 to get the daily rate of pay which is then multiplied by 203.
23. My calculation indicate the accrued leave for 203 days is worth Kshs 156,153/- and the Claimant is entitled to the same.
24. In the submissions, the Respondent made reference to my decision in *Ndao Mahupa Daluh v Crown Petroleum (K) Ltd* (2013) eKLR. In this decision, I made reference to section 90 of the Employment Act, 2007 in rejecting a claim for leave backdated to 10 years. Section 90 of the Act refers to two distinct limitations, based on causes of action constituting continuing injury and ordinary causes action arising out of unfair termination of employment.
25. In the said decision, the Claimant was dismissed in 2009 and he brought a claim in 2013. In the instant case, the Respondent had made an offer through its termination of employment letter dated 14 May 2014 to pay accrued leave and this was also outlined in the Response.

Off as at June 2014

26. Under this head of claim, the Claimant sought Kshs 212,718/-. No evidential basis for this claim was demonstrated. The Claimant simply stated that he was never relieved during the 12 years of service. The working hours and days per week applicable to the industry the Respondent operates within was not disclosed or proved.
27. This head of relief is declined.

Public holidays as at June 2014

28. Equally, the Claimant did not lay any evidential basis for seeking Kshs 99, 327/- except to state he worked during public holidays.

Gratuity/severance pay

29. The Claimant sought Kshs 120,000/- as severance pay. The Respondent had offered Kshs

110,000/-.

30.The Court would adopt the formula used to calculate the accrued leave and award the Claimant Kshs 126,923/-.

Compensation

31.The Court has reached a conclusion that the termination of the Claimant's employment through redundancy was unfair.

32.One of the primary remedies where such a finding is made is an award of compensation. The award however is discretionary.

33.The Court has awarded and in any case the Respondent had offered the Claimant severance pay.

34.Considering the severance pay, the Court would award the Claimant the equivalent of 2 months wages as compensation. The same is assessed as Kshs 40,000/-.

35.The Claimant was paid some Kshs 111,335/-. The amount should be deducted from the award herein.

36.Before concluding, a few remarks about an authority cited by the Respondent would be in order. The Respondent cited the case of *Rift Valley Railways (K) Ltd v Kiya Kalakhe Boru* (2015) eKLR for the proposition that Claimant's in employment disputes should provide particulars and material details of terminal dues, and also produce the employment records to disprove certain claims.

37.In my humble view, such a position can only obtain under the civil procedure regime and not in employment law and practice. And for this view, I would take umbrage under the provisions of sections 9, 10 and 13 of the Employment Act, 2007 and the reality that it is the employer who ordinarily maintains and keeps employment records. It would be an absurdity to expect an employee to keep track/record of working hours, overtime and the like.

38.In fact, legally and for evidential purposes, these are facts and records essentially within the purview and knowledge of the employer and therefore sections 108 and 112 of the Evidence Act would be implicated.

Conclusion and Orders

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

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|--------------------------------|----------------|
| a. Accrued leave | Kshs 156,153/- |
| b. Severance pay | Kshs 126,923/- |
| c. 2 months wages compensation | Kshs 40,000/- |

TOTAL	Kshs 323,076/-
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| d. Less amount paid | Kshs 111,335/- |
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Amount due	Kshs 211,741/-
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40.Claimant did not file or serve submissions as directed. He is denied costs.

Delivered, dated and signed in Nakuru on this 23rd day of October 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Muthanwa instructed by Muthanwa & Co. Advocates

For Respondent Ms. Kiiru instructed by Ndungu Karanja & Co. Advocates

