



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.310 OF 2015

JUSTUS OBARA OKARICLAIMANT

VERSUS

ROTO MOULDERS LIMITED RESPONDENT

JUDGEMENT

1. The issue in dispute is the unfair termination of employment due to redundancy and refusal by the Respondent to pay terminal benefits to the claimant

2. The claim is that on 6th June 2003 the Claimant was employed by the Respondent as a Machine Operator and paid Kshs.10, 374.00 per month. On 15th August 2014 the Claimant was terminated from his employment and informed that there was continuous lack of raw materials for production. The claim is for terminal dues for;

- a. One month's pay in lieu of notice
- b. Annual leave
- c. Severance pay
- d. Salary arrears for August 2014
- e. Underpayment may 2012 to April 2013
- f. Underpayment May 2013 to April 2014
- g. Underpayment May 2014 to august 2014
- h. Compensation for unfair termination

3. In evidence and to support his case, the Claimant testified that upon employment by the Respondent he was declared redundant but this was not a proper redundancy as for 5 years together with other employees they were asking for better terms and pay. He was therefore victimised unfairly for joining the union. It was therefore not a redundancy as stated but rather due to unionisation. He was a member of Kenya Food and Allied Workers union for 4 months and the Claimant was accused of being the ring leader. The termination affected him together with 40 other employees after being at the Respondent for 11 years. He went to the Labour Office but the dues computation were not agreed. Those who accepted were paid and those who refused to accept the offered dues were told to file their claims.

4. In cross-examination the Claimant testified that upon employment he was never issued with a contract, he started as a casual and later full time. On 15th August 2014 he was issued with a letter that the Respondent had no raw materials and that he would be paid in lieu of notice. He had asked to be issued with his letter of appointment but instead he was issued with a termination letter. Upon termination he was asked to clear so as to be paid the terminal dues. The years dues were not properly computed, leave due and days worked.

5. That severance pay had been computed at Kshs.36, 381, 00 and was increased to kshs.39, 112.00 which he rejected. The Respondent issued a pay slip and noted that they had paid for;

- a. Notice pay
- b. Severance pay
- c. Overtime
- d. Leave encashment

6. Severance pay was to be paid at kshs.10, 374.00 but it should be computed from 2003 to 2014 and not from 2008 to 2014. There was also an underpayment. He complained to the Respondent but this was not corrected.

Defence

7. In defence the Respondent stated that they had employed the Claimant as a machine Operator but was terminated on 15th August 2014 due to redundancy and due to continued lack of raw materials. The Claimant was offered pay in lieu of notice. The matter was discussed with the Labour Officer and the claimant's union and the dues agreed upon but the Claimant refused to collect his dues. On 29th October 2014 the Respondent responded to a letter they had received from Kituo cha Sheria and offered to settle the matter as agreed with the labour Officer. However the next thing the Respondent received was Court summons.

8. In evidence the Respondent called Jeremiah Nyaga the human resource manager who worked with the claimant. That they noted that each machine had 3 employees with a leader and an assistant. This was found to be in excess what of the Respondent required at the time. The Respondent decided to reduce staff. In 2013 several employees were laid off. Later there was a problem of sourcing raw materials as the United States Dollar had gone high and purchase of goods was affected. The Respondent informed the labour office and were advised to proceed with the redundancy. That severance pay should be settled. The Claimant was also given the reason for termination as from July to August 2014 there were no raw materials. Employees were laid off in 3 batches and the Claimant was in the last such group. The Claimant had asked for his letter of appointment but before this could be traced, the termination arose due to other reasons that of redundancy.

9. Mr Nyaga also testified that there was a meeting at the labour office where all dues were computed and the Claimant was to confirm and receive his package. However he opted to file suit. In the Respondent records, the Claimant commenced work in 2007 as a casual and was only made permanent in 2008. Not contract was issued. The Claimant was being paid on monthly basis. He was paid severance pay of 15 days for each year since 2008 as this was a case of redundancy. That all the other claims do not arise as the Claimant was paid the legal dues and compensation does not arise as this was not a case of dismissal.

Submissions

10. The Claimant in submissions restated his case and also attached the General Wages Order, 2012 and 2013 where a machine operator basic wage was set out at Kshs.11,580.30 and Kshs.12,654.90 respectively.

11. In submissions, the Respondent admitted that the Claimant was terminated due to redundancy for lack of raw materials. The matter was addressed by the labour office who advised on the payable dues. The Claimant submitted records showing that he was a member of NSSf from 2005 but the defence is that he was employed as a casual in 2005 and was confirmed in 2008 September. In 2014 there was a restructuring and lack of raw materials forcing the Respondent to terminate several employees on account of redundancy. The Claimant was dissatisfied with the computation of his dues and the matter was taken to the labour officer.

12. That the Respondent followed the provisions of section 40 in the termination of the claimant. That

in reply to the claimants demands the Respondent offered to pay;

- a. One month notice pay at Kshs.12, 654.90 and salary arrears for August 2014;
- b. Annual leave Kshs.5, 641.00 for leave due up and until September 2014;
- c. Severance pay at kshs.61, 161.00 based on time worked from 2008 to 2014;
- d. Certificate of service

13. The Respondent however contests that there is no compensation due in this case as there was no underpayment. The Claimant should be dismissed with costs.

Determination

14. The Claimant had no letter of appointment or contract of employment. The non-issue of the contract was a matter that the Claimant gave emphasis to in his evidence. This is confirmed by the Respondent witness where he testified that this is a matter that had been reported to him and since he needed to trace the letter of appointment, he took time and before he could get this letter, the issue of redundancy arose and the Claimant was laid off. Such a letter was so important to the Claimant that he agitated for it and when in August 2014 he was called together with other colleagues to receive their letters, he thought it was his long-awaited letter of appointment but alas! It was a termination. I also find that this letter is important too to the determination of these proceedings and the claim of dues owed in a redundancy.

15. As this Court has held in various cases, a written document enables each party to the employment relationship to know the terms and conditions of such employment. So important is such a document that sections 9 and 10 of the Employment Act is fully dedicated to the subject of what should go into an employment contract. Be that as it may, where parties are not able to immediately write such an employment contract, such should not wait for more than two months. Section 10(1) is mandatory and provides that;

10. (1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3) be given in instalments and shall be given not later than two months after the beginning of the employment—

[Emphasis added].

16. What the Respondent has attached as *RM-4 and 5* the confirm payments to NSSF is not an employment letter or a contract of employment. Such is not a document capable of making such a confirmation. Such a letter or document is clearly set out under section 9 of the employment Act as to its contents.

17. Without the employment letter or contract of employment, a duty that the employer should have fulfilled the word of the Claimant as to when he was employed has to stand. Equally, when the Claimant contested the number of years that he had served, the duty shifted to the Respondent to prove when the Claimant was employed and to produce the records necessary to show that from 2003 he was a casual employee and this changed in 2008. These records are kept by the employer as under section 73 and 74 of the Employment Act and when there is a dispute, the employer is the one to cause their production.

18. Indeed in submissions, the respondents admit that the last pay that the Claimant was entitled to under the Wage Guidelines is kshs.12, 654.90 and not 10,374.00 as set out by the claimant. Indeed the Claimant submitted *APP. JOO VII* which sets out his total earning as kshs.13, 764.04. This then is over and above the basic minimum as set out in the Wage order. The claim for underpayments noting the payslip the Claimant has attached in his evidence does not therefore arise. Such pay slip is for February 2013 at a time when the basic wage was below what the Claimant earned. Using this as a standard, to claim more, it was the duty of the Claimant to set out as to how such arose.

19. Redundancy is regulated under the provisions of section 40 of the Employment Act. Where there

exists a good reason for such, the employer must issue notice declaring the same and then proceed to issue another notice to the individual employees affected by the redundancy. Where an employer decides to terminate an employee without the two notices, the resulting termination becomes unfair as the procedures under section 90 are of the nature that;

40(1) an employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –

20. Therefore, no termination should arise, until and unless all owing dues have been paid. To thus proceed and terminate an employee on the basis of redundancy without first settling the terminal dues, even where there is notice pay, the procedure is flawed. It is not that notice pay is to sanction the termination, where a good reason exists and such a reason relates to redundancy, I take it then, the employer has taken time to assess their business and arrived at the decision to lay off employee. Before such lay off, all owing terminal dues should be paid. Some of such dues like leave pay owing should be paid in cash to enable the employee walk away with something tangible.

21. Any employment that is terminated unprocedurally, the same is unfair as under section 45 of the Employment Act. Compensation is due.

Remedies

22. Notice pay is admitted and this is confirmed at kshs.12, 654.90.

23. Leave is claimed at kshs.17, 716.86 but the Claimant failed to set out as to how such leave arose. An employee should not just state lump sum figures and expect to have such confirmed without question. Each item claimed must be proved. The Respondent has however offered to pay kshs.5, 641.00 which shall be confirmed.

24. Salary for august is admitted as owing and this is confirmed at kshs.5, 906.00. The Claimant worked until 14th August 2014. His work and time should thus be compensated.

25. Severance pay is an entitlement in redundancy. Based on the above analyses, the failure to give work records and or letter of appointment that was the subject of proceeding herein, dues in this regard shall be computed from 2003 to 2014 a period of 10 complete years as under section 40 of the Employment Act. The last salary the Claimant earned was based at kshs.12, 654.90 and such severance pay at 15 days for each year all is Kshs.63, 274.50.

26. On the finding that due process was not followed in the redundancy process, the termination of the Claimant was thus unprocedural and he is awarded compensation of one months' pay at kshs.12,654.90.

Judgement is hereby entered for the Claimant in the following terms;

- a. **The Claimant was unprocedurally terminated;**
- b. **Compensation at Kshs.12, 654.90;**
- c. **Severance pay at Kshs.63, 274.50;**
- d. **Salary for August 2014 at kshs.5, 906.00;**
- e. **Leave at Kshs.5, 641.00;**
- f. **Notice pay at Kshs.12, 654.90;**
- g. **Certificate of service to issue within 7 days; and**
- h. **Each party shall bear their own costs.**

Orders accordingly.

Delivered in open court at Nairobi this 16th day of December 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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