



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1564 OF 2012

STEPHEN MUSYOKA MUIA.....CLAIMANT

VS

MUNYIRI 64 TRADERS LIMITED

T/A MUNYIRI FISH & CHIPS.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of claim dated 4th September and filed in Court on 5th September 2012, the Claimant sued the Respondent for unlawful/unfair termination of employment and failure to pay terminal dues. The Respondent filed a Memorandum of Reply on 16th October 2012 but did not attend the hearing on 11th December 2013 despite due notification.

The Claimant's Case

2. The Claimant was employed by the Respondent as a general worker effective July 2007. He worked until 7th February 2010 when he and his colleagues were notified that the business premises would be closed down for renovation. The Respondent undertook to recall the Claimant and his colleagues once business resumed. In February 2011, the Claimant's colleagues were recalled. Upon inquiry on the status of his employment, the Claimant was informed by the Respondent's Manager that there was no position for him.

3. According to the Claimant his employment was terminated by way of declaration of redundancy. He pleaded that in declaring him redundant, the Respondent did not follow the procedure set out in Section 40 of the Employment Act, 2007. The Claimant therefore claims the following:

- a) A declaration that the termination of his employment was unfair and unlawful
- b) 3 months' salary in lieu of notice.....Kshs. 24,000
- c) Leave pay for 2008-2010.....24,000
- d) Service pay for 3 years @ 18 days' pay per year.....14,400
- e) 12 months' salary in compensation.....96,000

- f) Certificate of service
- g) Costs

The Respondent's Case

4. In its Reply, the Respondent admitted having employed the Claimant as a general worker between April 2008 and February 2010. The Respondent stated that the Claimant was duly notified that the Respondent's business would be closed down due to reasons beyond the Respondent's control as the landlord was renovating the entire premises.
5. It was the Respondent's case that the Claimant was not declared redundant and Section 40 of the Employment Act, 2007 was therefore not applicable. Further, the Respondent stated that the Claimant refused to resume duty on 1st March 2011.

Findings and Determination

6. The mode of termination of the Claimant's employment is in dispute. The Claimant testified that he was declared redundant. The Respondent on the other hand stated that the Claimant refused to resume duty on 1st March 2011 since he was already employed elsewhere as an artisan/painter.
7. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy as:

“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.”

8. It is not in dispute that the Claimant left the Respondent's employment because the business was closing down to pave way for renovations. What is in dispute is whether upon resumption of business, the Claimant was recalled. The Claimant told the Court that he was not recalled and the Respondent stated in its Reply that the Claimant was actually recalled but declined to resume duty because he was engaged elsewhere.
9. The Respondent exhibited a letter dated 31st December 2009 addressed to all employees giving them notice of the closure of business as well as instructions on resumption of duty. The Claimant however denied having received this letter. In the absence of evidence in support of the Respondent's statement that the Claimant was recalled but declined to resume duty, the Court adopted the Claimant's account to the effect that he was not recalled. In the circumstances, I find that the Claimant's employment was terminated by way of declaration of redundancy.
10. Section 40 of the Employment Act, 2007 sets the conditions to be met by an employer before terminating an employee's employment on account of redundancy as follows:
 - a) ***Where the employee is a member of a trade union, the employer notifies the union of 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 the 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 an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

11. There is no evidence that the Respondent complied with any of the conditions set out in Section 40 of the Employment Act, 2007 and I therefore find that the termination of the Claimant's employment was unfair within the meaning of Section 45 of the Act.

12. Consequently, I award the Claimant the equivalent of 3 months' salary in compensation. I also award him one month's salary in lieu of notice. The Respondent did not produce any leave records to counter the Claimant's claim for leave pay. This claim therefore succeeds and is allowed. The Claimant told the Court that he was a member of the National Social Security Fund (NSSF). He is therefore not entitled to service pay.

13. In the final analysis, I make an award in favour of the Claimant in the following terms:

a) 3 months' salary in compensation for unfair termination.....	Kshs. 24,000
b) 1 month's salary in lieu of notice.....	8,000
c) Leave pay (8,000/30x42).....	<u>11,200</u>
Total.....	<u>Kshs.43,200</u>

The Claimant is also entitled to a certificate of service.

The Respondent will meet the costs of this case.

This award is subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF FEBRUARY 2014

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JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*