



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 97 OF 2013

SAMUEL MWEMA MANZICLAIMANT

VERSUS

AGAKHAN SPORTS CENTRE.....RESPONDENT

JUDGMENT

BACKGROUND

The claimant was employed by the respondent on 11/7/2000 as Assistant Manager/Book keeper. On 29/1/2001 he was confirmed as the manager with a monthly salary of ksh.18000 which was thereafter increased 50,000. He was terminated through redundancy on 24/4/2012 by a letter dated 1/3/2012. The letter detailed the redundancy dues as ksh.492,294.00 which he disputed by his email dated 29/4/2012 by claiming ksh.707,292.00. When a compromise was not reached the claimant brought this suit claiming ksh.702,292.00, interests costs and any other remedy the court may deem fit to grant.

In her defence, the respondent contended that she lawfully terminated the claimants services through redundancy in accordance with Section 40 of the Employment Act 2007. She averred that the claimant was only entitled to ksh.492,292 as his redundancy dues and no more of which she was at all material times ready and willing to pay but the claimant declined to accept.

On 7/5/2013 the counsel for the two parties entered a consent judgment in respect of the sum of Ksh.492,292 as admitted under paragraph 8 of the defence. The said figure of ksh.492,292 comprised of ksh.5000, ksh.46,142,

ksh.346,140 and ksh.50,000 being salary for March and April 2012, 12 years service pay and one month salary in lieu of notice going by the respondents' email dated 29/6/2012. The remainder of the claim was heard on 8/9/2013 and 29/10/2013 when the claimant testified as CW1 while the respondent called Mr. Ariff Manji to testify as RW1.

CLAIMANTS CASE

CW1 confirmed that he was employed by the respondent on 11/7/2000 and served continuously until 24/4/2012 when he was terminated by way of redundancy. On 22/12/2011 he handed over to a Mr. Rahim Rawani (accountant) before commencing his leave on 23/12/2011. The leave letter was for the year 2009/2010 and was to end on 2/2/2012 but when he returned to work on 3/2/2012 he was given a letter to proceed on leave for another month for the 2010/2011 year. When he returned to work on 2/3/2012, he was told not to resume work until the chairman of the respondent talked to him. The

chairman kept him waiting at the workplace for the whole day only to tell him to see him the following day.

On the following day the chairman verbally told him that the Board had decided to terminate his services. On 24/4/2012 the directors called him for a meeting to discuss the issue of his termination. The chairman however did not accord the claimant any hearing and only walked out of the meeting. The claimant was then given a termination letter which the Chairman refused to sign. The letter was dated 1/3/2012 and stated the reason for the termination as retrenchment due to economic difficulties. According to the CW1, the respondent had no such difficulties but only wanted to replace him with a person of chairman's race. He contended that after terminating the claimant, the respondent increased his staff from 6 to 15. He contended that the procedure for his retrenchment was wrong and his successor was given a higher salary than what CW1 was earning.

He prayed for 3 months salary in lieu of notice based on the regulations of wages Hotels and Catering Traders order Section 20 (Cap 229). According to CW1 the said regulations entitled him to 3 months notice before termination because he had served continuously for 12 years. He also prayed for arrears in salary increment for 6 months because his appointment letter provided for annual salary increment and his anniversary was in the month of May of every year. He contended that in 2011 his salary increment was delayed by the Board until November 2011 when the Board met. The salary increment of ksh.1000 was not backdated to May 2011 as it ought to have been.

CW1 further prayed for leave outstanding for the period between July 2011 and April 2012. The claimant further prayed for declaration that his retrenchment was unlawful and unfair and award him damages. He contended that the reason for retrenchment was not valid and further that no proper notice was served on him and the labour office before the termination.

On cross examination CW1 admitted that the appointment letter provided for one month termination notice. He maintained that his leave due for 2011/2012 was 26 days. He further confirmed that there were some years when he received no salary increment. He also confirmed that after salary increase in 2011 he never received any written evidence to show that it was backdated to May 2011.

DEFENCE CASE

RW1 is the chairman of the respondent for the last 3 years. He confirmed that CW1 was the respondent's manager and had served from 11/7/2000 to 24/4/2012 when he was terminated on redundancy by letter dated 1/3/2012. He maintained that the claimant was entitled to only one month notice under the contract. He denied that the respondent was not doing catering business and maintained that she was only renting out halls for meeting and sporting. He clarified that the cafeteria in the respondents premises was rented out to a tenant who was independent from the respondent.

RW1 contended that the CW1 refused to hand over or collect his dues. He further contended that the salary increment to CW1 was from October 2011 and not backdated to May 2011. He maintained that salary increase for all the staff was from May 2011 but the claimant refused the minimum increment according to the government order and demanded a higher amount which was subject to Boards approval. The Board did not meet until October 2011 he received a higher increment than what he had rejected in May 2011. RW1 denied that CW1 had any outstanding leave not taken. He also contended that all CW1's dues were calculated and paid less taxes. RW1 denied that CW1 was retrenched in order to get rid of him. He admitted that another person was employed as an accountant but only 3 months.

On cross examination he admitted that he was not aware of the Regulations Wages (Hotels and Catering Traders) order but denied that the claimant was falling under them because the respondent was not doing catering trade. He however admitted that clubs fall under the said order.

RW1 admitted further that the claimant worked for 12 years and under the said order he was entitled to 3 months termination notice. He denied that the claimant was not paid his dues because he refused to hand over important files to the club. He insisted that it is the claimant who refused to take the pay. RW1

admitted that in 2012 the respondent had 15 employees but could not tell when they were recruited. He contended that he informed the labour office of the intention to restructure staff and he was advised that administration staff were not protected from redundancy. He maintained that the claimant received the retrenchment letter in March 2012 but it was signed on 24/4/2012 by Raim because RW1 was away.

On re-examination, he admitted that new workers were recruited after termination the claimant. After the close of the hearing both parties filed written submissions which I have carefully considered in this judgment

ANALYSIS AND DETERMINATION

The issues for determination arising from the pleadings, evidence and submissions are:

- a. **whether the retrenchment of the claimant was lawful.**
- b. **Whether the claimant was entitled to any dues after the said retrenchment.**

Whether the retrenchment was lawful

The legality of retrenchment otherwise called redundancy in Kenya can only be verified from the provisions of Section 40 of the Employment Act 2007. Redundancy is only lawful if done procedurally according to the said Section 40 *supra*. Firstly the employer is required to give a mandatory one month prior written notice to the labour officer and the employee or union if the employee is a member of a trade union. Secondly the manner of selection of the victims of the said redundancy must be fair. Lastly the employer must pay to the employee certain statutory dues which include one month salary in lieu of notice, severance pay of at least 15 days per year of service in addition to any other employment benefits accruing before the said termination. After careful evaluation of the evidence this court is satisfied that there was no one month written notice served on the labour officer and the claimant prior to the termination.

Secondly the selection of the victims of the exercise of retrenchment was not fair. The defence did not demonstrate how the exercise was done. The court agrees with the claimant that the reason given for his retrenchment, that is, economic difficulties was valid. The reason for this finding is that the RW1 corroborated CW1's testimony that a new person was employed to replace him immediately in addition to new more permanent staff. The foregoing scenario was not consistent with a moneyless employer.

Lastly, although the respondent demonstrated that she calculated redundancy dues in readiness to pay the claimant, it is obvious that such calculations were unilaterally done and on the presumption that the retrenchment was lawful. This court however is of the considered opinion that the procedure of terminating the claimant's services fell short of the provisions of Section 40 of the Employment Act.

The mandatory one month prior written notice to the claimant and the labour office was enough to render the exercise unlawful. The matters were worsened by the fact that new and more staff members were recruited immediately after the dismissal of the claimant. Consequently the redundancy of the claimant was never lawful but unfair and wrongful termination of his employment. This finding however serves the purposes of starting the position of the law as written in the statutes in view of the fact a consent judgment was recorded between the parties based on the redundancy law.

REMEDIES AVAILABLE

This suit is about failure to pay redundancy benefits. Lawful benefits for redundancy are provided for under Section 40 of the Employment Act as follows;

- a. **One month notice in lieu of notice, severance pay at a minimum rate of 15 days, per year of service plus other accrued benefits like leave days not taken and salary arrears.**

In the present case the claimant has prayed for salary for march and April 2012, severance pay for 12 years, 3 months salary in lieu of notice, one month leave for 2011/2012 plus salary increment arrears for May to October 2011 all totaling to ksh.702,292.00

The respondent has admitted one month salary in lieu of notice, 12 months severance pay and salary for march and April 2012 totaling to ksh.492,292.00. A consent judgment was entered on the said ksh.492,292.00 in favour of the claimant. What remains is claim for the balance of ksh.21000 as prayed by the claimant and any other which the court may deem fit to grant.

The court does not think that under Section 40 *supra*, an employee suing for redundancy can recover more than one month salary in lieu of notice. Even if there are statutory regulations providing for a longer notice period before termination, Section 40 *supra* is a special regime and the only one which governs claims for redundancy unless the claimant was asking the court to declare the redundancy as amounting to either a breach of contract or unfair termination for which the remedies are different.

In the present case, the pleadings are specifically, calls based in Section 40 of the Employment Act. Consequently the court finds that the claimant was only entitled to one month notice before redundancy. The court also finds that the claimant was entitled to the salary for March and April 2012 and the 12 months severance pay as prayed and consented vide the consent judgment aforesaid.

In addition to the foregoing the court grants the prayer for leave for the period between July 2011 and April 2012 which is about 9 months on pro-rata basis. That amounts to $9/12 \times 20 = 22.5$ day for which the court awards ksh.37500/-. The court had also been asked to award ksh.60,000/- being backdated salary increment for May to October 2011. The claimant stated that he was entitled to annual salary increment from May 2011 just as the other employees. RW1 confirmed that all the staff members were entitled to salary increment from May 2011 in line with government wage order. The wage increase for the claimant was however higher than the other junior staff and was subject to approval by the Board of directors of the respondent. That the Board delayed its meeting until October 2011 when the salary increase for the claimant was approved by ksh.10000/-.

According to the RW1 the increment was not backdated to May 2011. The question that arises is whether the delay in board meeting was to be blamed on the claimant. In the courts view the intention of the parties was that salary increment was to take effect in May 2011 for all the employees. It would be discriminatory to treat the claimant differently from other employees just because his salary had to await for the boards approval of which he had no power to convene in May 2011 or at all. In all fairness the court grants the prayer for ksh.60,000 being arrears in respect of salary increment for may to October 2011 as intended by the two parties herein. If the court held otherwise, a bad precedent would be created to authorize employers to abuse discretion in a manner that would promote discrimination among their employees.

DISPOSITION

In view of the matter above judgment is entered for the remainder of the claim as follows:

- a. **pay in respect of 22.5 accrued leave days for 2011/12....37,500**
- b. **arrears of salary increase for may to October 2011.....60,000**

 Kshs 97,500

in addition to the consent judgment of ksh.492,292 recorded on 7/5/2013.

The claimant will have costs plus interest.

Orders accordingly.

Signed, dated and delivered this 14th day of February 2014.

O.N. Makau

Judge