



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 329 OF 2013

FESTUS MWALUMA CHARLESCLAIMANT

VERSUS

ELSEK & ELSEK [K] LTDRESPONDENT

J U D G M E N T

INTRODUCTION

This is a suit seeking compensation for unfair termination and accrued employment benefits. The claimant was employed from 4/4/2010 and his salary was ksh.16293 per month. The respondent has denied liability terming the reason for the termination as redundancy occasioned by the completion of the Kikambala Housing project. She also contended that the claimant was paid all his terminal dues for the days worked after the termination. The case was heard on 5/12/2013 and 26/2/2014 when the claimant testified as CW1 and with the consent of the parties the written statements of Shahame Aziz Mwidani was admitted as evidence for the defence.

CLAIMANTS CASE

CW1 was employed as panel beater by the respondent by letter dated 4/4/2010 produced as exhibit 1. He worked until 23/7/2013 when he was dismissed verbally without any notice or any reason being given to him. Upon dismissal he was paid ksh.11000 only for the days worked in July 2013. He was not given any certificate for service or paid terminal benefits. At the time of his dismissal his salary was ksh.16292 as per the payslip produced as exhibit 2. The payslips did not however reflect any housing allowance as it was not being paid to him.

CW1 prayed for severance pay, leave for 4 years, house allowance, overtime, notice pay and refund of his NHIF deductions which were never remitted. On cross examination, he contended that his workstation was Miritini. He confirmed that the appointment letter did not provide for house allowance. He denied ever going for leave or ever forfeiting it. He blamed the employer for not scheduling his leave. He admitted receiving cheque from employer but clarified that he was promised to be called back to work. He however denied ever signing any discharge voucher. He confirmed that he now has another job but did not state when he got it.

DEFENCE CASE.

Mr. Shahame Aziz Mwidani is a professional accountant. He stated that the respondent had a major PROJECT AT Kikambala area known as Kikambala Housing Estate ltd for construction of cheap houses

using materials imported from Turkey. The respondent also had its own factory based at Miritini area for manufacturing materials for construction of houses at Kikambala. The project came to an end and the respondent decided to reduce the workers at both the Kikambala Estate and the factory. The claimant was therefore terminated and paid his salary and/or dues on 23/7/2013 for which he signed a discharge voucher for cheque no. 00322. The company promised to give priority to workers affected by the redundancy in case of any future recruitment.

After the hearing the parties were directed to file written submissions but only the claimant complied.

ANALYSIS AND DETERMINATION

Upon perusing the pleadings and considering the evidence and the submissions, the following issues arise for determination

1. **Whether the termination of the claimants employment by the respondent was unfair and wrongful.**
2. **Whether the reliefs sought ought to issue.**

Unfair termination

The respondent alleges that the termination was through redundancy. The claimant however contented that the termination was unfair for lack of notice and reason. Redundancy is a special procedure for terminating employment when the employee is not to blame for the termination. The procedure requires to be strictly adhered to otherwise it results to unfair termination. Unfair termination is one which is done in breach of a statutory obligation regarding procedure and the reason for the termination.

In the present case the court is satisfied that the procedure followed was not the one prescribed by Section 40 of the Employment Act. The said provision requires that before declaring an employee redundant, the employer must serve one month prior notice to the Labour officer and the employees or his union if he is was a member of a union. There is no evidence that, that preliminary procedure was followed and hence the whole process became wrongful and unfair. In addition, the respondent never paid to the employee any severance pay, one month salary in lieu of notice and other accrued benefits. There is also no evidence to show that the procedure of identifying the employees for the redundancy was fair. Consequently the court declares the termination of the claimant's employment to have been unfair and wrongful within the meaning of Section 45 of the Employment Act.

Reliefs sought

In view of the above declaration, the court awards the claimant compensation plus accrued employment benefits. He will get pay in lieu of leave accruing for the period of service being 3 years 4 months that is 70 days. Hence $70/30 \times 16293 = 38,017/$

The claimant is further awarded ksh.16293 being one month salary in lieu of notice. He will also get 6 months gross salary though not specifically pleaded as compensation for unfair termination being $ksh.16293 \times 6 = 97,758$. In making this award the court appreciates that the claimant was not represented by counsel and that he has a new job. The claimant will also get refund of ksh.11,540 being NHIF deductions for 37 months which the respondent failed to remit to the NHIF. The employer did not specifically refute that claim by the claimant both in the defence and evidence. She never denied the allegation in her defence or in the statement by her witness. The burden is on the employer to disprove by records, all allegations by an employee that the employer has breached the obligation to pay all the due wages.

The prayer for house allowance is dismissed because the claimant acquiesced to the default. Why should one wait for over 3 years until after dismissal for an employee to demand house allowance. In the alternative the court is of the view that the salary was consolidated pay and that is why the claimant did not demand house allowance during his time of service. The court will also not award the prayer for

overtime for want of particulars and evidence.

DISPOSITION

In view of the findings above judgment is entered for the claimant for ksh.163,908. The claimant will get costs and interest from the date of filing suit.

Signed, dated and delivered this 25th day of April 2014

O.N. Makau

Judge