



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 267 OF 2013

BARRACK ODHIAMBO OCHIENGCLAIMANT

VERSUS

ELSEK & ELSEK [K] LTDRESPONDENT

J U D G M E N T

INTRODUCTION

This is suit about unlawful termination of employment by the employer by which the claimant seeks to recover accrued employment benefits plus compensation for the unlawful termination. The suit was filed by the claimant in person but later he engaged counsel who amended it on 29/10/2013.

The respondent has filed a response denying liability and contended that the termination was through redundancy due to the completion of the respondents main project called Kikambala Housing Project. In addition the respondent contends that all dues for the days worked for were paid to the claimant who signed a discharge voucher releasing the respondent from any further liability or claim whatsoever. The suit was heard on 20/2/2014 when the claimant testified as CW1 while Shahame Azizi Mwindani testified for the defence as RW1.

CLAIMANT'S CASE

CW1 was employed by the respondent as a painter on 16/5/2011 by a letter dated the same date which he produced as exhibit 1. He worked until 22/7/2013 when he was terminated for no reason and without notice. His salary was ksh.19828 as per the payslips produced as exhibit 2. On the fateful day he was called among other workers and were told that there was no work for them the following day and that they were supposed to go for their dues at the office at Nyali. When he went to the office as directed by respondent he was not paid until the following week when he was paid ksh.18000 being the salary for the days worked for in the month. He was then told to go and wait to be called back to work but that was never to be although the respondent has projects going on in Mombasa and Nairobi.

He prayed for salary, one month salary in lieu of notice, overtime and house allowance, leave days outstanding, 12 months salary being compensation for unfair termination.

On cross examination CW1 confirmed that he was employed due to the Kikambala project but could work for the respondent anywhere else. He explained that as at the time of termination only 2 out of

53 houses had been completed and sold. All the doors for the project had not been painted save for the two ones which had been sold out. He contended that his duty included painting of doors and tracks for transporting materials.

DEFENCE CASE

Rw1 is an accountant in the respondents office. He stated that CW1 was their employee based at Kikambala. He was painter of doors. He confirmed that CW1 was terminated in mid 2013 when the respondent decided to reduce her workforce after finishing the projects of constructing houses. The procedure followed in terminating CW1 services among others is that they summoned the workers and explained to them the need to discharge them. The CW1 was paid ksh.18000 as settlement for years worked and not as salary for the month he was terminated. RW1 confirmed that Miritini site was for production for construction materials but has now been converted into a storage and selling point for imported materials.

RW1 denied the claim for overtime and dismissed the exhibit 4 as unofficial document which is not authentic. He contended that painting was not done at night while offloading was done by folk lift. He further denied the claim for leave contending that CW1 went for leave during his 2 years service. He confirmed however that the CW1's payslips did not indicate house allowance.

On cross examination, he confirmed that he summoned workers on Saturday afternoon and explained that they were going to be terminated and the workers consented. He contended that the evidence of the workers consent to terminate was the discharge voucher they signed. He further contended that there were official forms for recording overtime but he did not produce any. Likewise he did not produce CW1's leave records. He concluded by admitting that CW1 could be allocated other duties including off loading.

After the close of the hearing the parties were directed to file written submissions but the defence did not while the claimant complied.

ANALYSIS AND DETERMINATION

upon perusal of the pleadings and upon considering the evidence and the submissions filed, the following issues arise for determination:

- 1. whether the termination of the claimants employment by the respondent was unlawful.**
- 2. Whether the reliefs sought ought to issue.**

Unlawful termination

The claimants evidence is that he was unfairly discharged because he was not given any notice or reason for the termination . On the other hand the respondent contends that she declared the CW1 and other workers redundant after completion of the project at Kikambala. Termination is unfair within Section 45 of the Employment Act if the procedure followed is not equitable or fair and if the reason for the termination is not justifiable.

In the present case, the reason given is that the project being undertaken at kikambala was completed and as such there was need to reduce workforce. The question that arises is whether the right procedure was followed to discharge the claimant through redundancy. The answer to this query is in Section 40 of the Employment Act which provides that before redundancy the employer must serve a month written notice on the labour officer and the employees union or the employee personally if he is not a member of a union. The employer must then pay severance pay to the employee, one month salary in lieu of notice plus all other accrued employment benefits. The said provisions further require that the exercise of identifying the workers to be declared redundant must be fair and further that the employer must state how long the redundancy is to last.

In the present case, RW1 merely called the CW1 and other workers on the fateful Saturday and declared to them that their services were no longer required and invited them to collect their dues from the office at Nyali. No evidence of any notice to the labour officer or the employee was produced in court. No evidence of the procedure followed in identifying the victims of the redundancy was adduced in court.

Finally no pay was made to the claimant in lieu of notice nor was severance pay and other accrued benefits were made to the claimant. The only pay made was ksh.18000 which the claimant maintains that it was the pay for the days worked in July 2013. The explanation by the defence that such an amount was in full settlement for the redundancy is both unbelievable and unsubstantiated. Consequently the court finds that the procedure followed to terminate the services of the claimant was in contravention of Section 35 and 40 of the Employment Act and amounts to unfair or unlawful termination of employment within the meaning of Section 45 *supra*.

Reliefs sought

The prayers sought are in the amended claim filed on 29/10/13 by a counsel. The court therefore proceeds to make the award fully conscious that the claimant was represented by a competent counsel and therefore capable to making perfect pleadings. In view of the finding above that the termination was unfair, the court grants the prayer for declaration that the termination was unfair and unlawful. The court further makes declaration that the claimant was entitled to 21 days leave after every 12 months period of continuous service.

The court then awards ksh.19828/ being one months salary in lieu of notice. The court also awards ksh.27,759/ being pay in lieu of leave for 42 days. The prayer for over time is dismissed for lack of particulars and evidence. The exhibit produced as exhibit 4 was a photocopy that is not legible. Likewise the prayer for house allowance is dismissed because it seems that the salary was consolidated salary agreed by the parties to the contract. If that was not so, why didn't the claimant raise the complaint earlier even before the termination of service?

Lastly the claim for severance pay is dismissed because the suit before the court is about unfair dismissal and the court has already made declaration to that effect. The effect of the said declaration is to deem the alleged redundancy as a nullity. The prayer for severance therefore cannot arise where there is no finding that the termination was by redundancy. The only relevant award would have been service pay but again the same is ousted by the fact that the payslip produced by the CW1 show that he was a member of the NSSF. By dint of Section 35 of the Employment Act, members of the NSSF are excluded from demanding service pay.

The claimant did not pray for compensation for unfair termination which is equivalent to 12 months gross gross salary. In view of the fact that the claimant had a series of advocates which he seemed to change at every stage of the proceedings, the court is of the view that he had the means and the expertise to enable him make such a prayer but he chose not to.

DISPOSITION

For the reasons and findings made above, judgment is entered for the claimant for ksh.47587/ plus costs and interest from the date of filing the suit.

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

O.N. Makau

Judge