



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 86 OF 2013

GEORGE WERE OMONDICLAIMANT

VERSUS

BAOBAB BREEDING SYSTEMS LTDRESPONDENT

J U D G M E N T

INTRODUCTION

The claimant filed this suit alleging unlawful termination of his employment or refusal to pay terminal dues by the respondent. The cause of action arose on 30/11/2011 when the respondent served the claimant with a letter dated 28/11/2011 notifying him that she was closing business and terminating employment effective 30/11/2011 due to lack of funds.

No terminal dues were paid prompting the suit before the court. The respondent has admitted that she declared the claimants redundant due to lack of funds but denies that the termination was unlawful. While this suit was pending 12 other claims were brought related to the present one. They include ICC Nos. 168, 169,170,171,172,173,174,175,176,177,181 and 182 of 2013. All the claimants were respondent's employees who were terminated under similar circumstances with the claimant herein.

On 27/11/2013, the counsel for the claimants and the respondent recorded a consent whose effect was to consolidate the 13 files under this case for purposes of determining liability. By further consent the counsel agreed to dispose of the suits by way of written submissions. The claimant counsel filed and served his submissions by 16/12/2013 while the defence had up to 31/12/2013 to file and serve his submissions.

Judgment was scheduled for delivery on 28/2/2014. However the claimants counsel delayed his submissions upto 11/2/2014 which prompted the defence to seek extension of time for filing of their submissions. The court granted the extension for two weeks but the submissions were not filed until 17/4/2014. On perusal of the submissions filed, the court was left wondering whether they were not a duplication of the pleadings filed.

ANALYSIS AND DETERMINATION

The issues for determination arising from the pleadings and submissions are;

- a. **whether the termination of the claimants employments by the respondent was unlawful.**
- b. **Whether the claimants were entitled to the reliefs sought.**

Unlawful termination

Termination of employment is unlawful if it is done without complying with laid down legal procedures or for unjustifiable reasons. This is what is otherwise called unfair termination.

In the present case the termination was done vide letter dated 28/11/2011 which stated in part as follows:

“due to reasons beyond our control, BBSL is closing down its operations effective 30th November 2011. we shall therefore not be in a position to offer employment to you due to lack of funds. Any inconvenience is highly regretted. We however wish to thank you for your diligent services over the years.”

The said letter gave only a two days notice and did not make any offer to pay any terminal dues. According to the two parties the termination was by redundancy. In the words of the defence, the redundancy was inevitable due to lack of funds after embezzlement by some employees who did not include the claimants.

From the facts and the wording of the termination letters, the discharge was obviously by redundancy. Section 2 of the Employment Act defines redundancy as

“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.”

In the present case the employees are not to blame for their dismissal. It is the employer to blame for their dismissal. The employer has not pleaded any wrong doing by the claimants nor is she exercising a liberty under the terms of the Employment Contract. She is simply saying that she cannot continue employing the claimants due to lack of funds to sustain them.

The question that follows is whether the right procedure was followed in declaring the claimants redundant. The answer is in Section 40 of the employment Act. The said provision bars an employer from declaring an employee redundant unless strict compliance with procedure is observed.

Some of the strict procedural requirements under the said provision include a mandatory minimum of one month written notice to the labour officer and the employee or his union and payment of all the accrued employment benefits. In the present case, the notice served was for only 2 days and no terminal dues were offered. The notice was never served on the labour officer. That breach of Section 40 of the Employment Act rendered the termination unlawful and unfair procedurally. It was never a valid redundancy.

Reliefs Sought

The court is persuaded by the foregoing finding to hold that all the claimants in this dispute are entitled to their employment benefits that accrue under Section 49 of the Employment Act. The said benefits include at least notice pay and accrued leave days among other power benefits as provided for under their respective contracts and the Employment Act. They are also entitled to compensation for unfair termination because the procedure followed in discharging them was not just and equitable within the meaning of Section 45(5) of the Employment Act since it violated Section 35, 40 and 41 of the said Act and the employment contract. They are however not entitled to severance pay because the termination was not by redundancy. They are disqualified from service pay by Section 35 of the Employment Act because they were NSSF members. The court will assess the benefits due to the claimants in their respective files.

In this claim George Omondi Were is awarded three months salary in lieu of notice being ksh.210,000 as prayed although the contract exhibited intended a compensation of upto a maximum of 12 months. He is also awarded 21 days leave being ksh.49,000 in line with the appointment letter.

The prayer for refund of ksh.24,000 being un-remitted HELB loan deductions is granted. The court is persuaded by the unrebutted evidence adduced by the claimant in the form of payslips. In conclusion the claimant is awarded 12 month salary being ksh.840,00/ compensation for unlawful and unfair termination. No justification was shown to justify why the law was ignored with impunity. Why would an employer who describes the services of his employee as diligent wake up one morning and ignore the law and serve a two days redundancy notice? And why should she expect the court to be lenient on her in this judgment in the circumstances?

DISPOSITION

In view of the findings above, judgment is entered for the claimant against the respondent as follows:

- a. that the termination of the claimant's employment is declared unlawful and unfair. This declaration applies to the claims under case Number ICC 168,169,170,171,172,173,174,175,176,177,181 and 182 of 2013.
- b. the respondent to pay the claimant in this case Ksh.1,123,000/-
- c. costs and interest.

Orders accordingly.

Dated, signed and delivered this 25th day of April 2014.

O.N. Makau

Judge