



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 2484 OF 2012

BERNARD LEVOYWA.....CLAIMANT

VS

SALINA TRANSPORTERS LIMITED.....RESPONDENT

AWARD

Introduction

1. The Claimant's claim brought by way of Memorandum of Claim dated 11th December 2012 and filed in Court on even date seeks compensation for unlawful termination of employment and failure to pay terminal benefits.
2. The Respondent filed a Memorandum of Response on 4th January 2013 but made no appearance when the matter came up for hearing on 2nd April 2014, in spite of due service. The Court therefore proceeded to hear the Claimant *ex parte*.

The Claimant's Case

3. The Claimant was employed by the Respondent as a long distance driver at a monthly salary of Kshs. 19,000 effective January 2007. The Claimant worked for the Respondent until April 2012 when he was declared redundant without any notice.

4. The Claimant therefore claims the following:

- a. 3 months' salary in lieu of notice.....Kshs 57,000
- b. Salary for April 2012.....Kshs. 19,000
- c. Severance pay for 4 years.....Kshs. 76,000
- d. General damages equivalent to 6 months' salary.....Kshs. 114,000
- e. Certificate of service
- f. Costs plus interest
- g. Any other relief the Court may deem just to grant

The Respondent's Case

5. In its Memorandum of Response filed on 4th January 2013, the Respondent admitted having employed the Claimant up to April 2012. The Respondent denied having declared the Claimant redundant and stated that all contractual obligations to the Claimant were duly met upon termination of his employment in April 2012.

6. The Respondent goes on to plead that the Claimant deserted duty and later collected his final dues amounting to Kshs. 18,528 which he acknowledged and discharged the Respondent from any further liability.

Findings and Determination

7. The main issue for determination in this case has to do with the mode of termination of the Claimant's employment. At paragraph 5 of the Memorandum of Claim, the Claimant claims that he was declared redundant and at paragraph (iii) of the submissions he states that the Respondent informed him that he would be declaring him redundant and employing him afresh without paying him terminal benefits for the years already worked. In his sworn testimony, the Claimant told the Court that the lorry he was driving was sold.

8. The Respondent at paragraph 3 of the Memorandum of Response states that the Claimant's employment contract was legally terminated in April 2012 while at paragraph 5, the Respondent pleads that the Claimant left employment on his own free will and asked for his dues. Further, at paragraph 6 of the Memorandum of Response, the Respondent claims that the Claimant absconded duty and later went to collect his benefits from the Respondent.

9. 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.”

10. In view of the conflicting pleadings presented by the Respondent which were not confirmed in evidence, the Court has adopted the Claimant's account regarding the mode of termination of his employment.

11. The law recognises redundancy as a valid ground for termination of employment. However, Section 40 of the Employment Act, 2007 sets the following conditions which must be met by an employer before terminating an employee's employment on account of redundancy:

- 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.

12. Where an employer fails to meet these conditions, then the termination of employment becomes unfair within the meaning of Section 45 of the Act. The Respondent produced a terminal benefits certificate dated 24th July 2012 signed by the Claimant in acknowledgement of receipt of his terminal dues and in confirmation that the Claimant had no further claims to make against the Respondent.

13. However, as held by this Court in the case of **Simon Muguku Gichigi Vs Taifa SACCO Society Limited [2012] eKLR** an employer cannot circumvent their obligation to an employee by waving a form of discharge signed by the employee. If the law is not complied with, no form of discharge can cure the irregularity. I see no reason to depart from this position and will therefore deal with the Claimant's case within this context.

14. 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 the termination of the Claimant's employment to have been unfair within the meaning of Section 45 of the Act and award him 4 months' salary in compensation. I also award him 1 month's salary in lieu of notice as well as severance pay at the rate of 15 days' for every completed year of service. According to the terminal benefits certificate submitted by the Respondent, the Claimant left the Respondent's employment on 12th April 2012. I therefore award him salary for 12 days worked in April 2012.

15. Cumulatively, I make an award in favour of the Claimant in the following terms:

a) 4 months' salary in compensation for unfair

termination.....Kshs. 76,000

b) 1 month's salary in lieu of notice.....Kshs 19,000

c) Severance pay (4 completed years of service).....Kshs 38,000

d) Salary for 12 days worked in April 2012.....Kshs 7,600

Total.....Kshs 140,600

16. I further award the Claimant the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF MAY 2014

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JUDGE

In the Presence of:

.....**Claimant**

.....**Respondent**

