



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 249 OF 2013

STEPHEN KARISA JEFWA

CLAIMANT

v

ELSEK & ELSEK (K) LTD

RESPONDENT

JUDGMENT

1. Stephen Karisa Jefwa (Claimant) was employed by Elsek & Elsek (K) Ltd (Respondent) on 8 May 2012 as a Mechanical Engineer based at its Miritini factory. His terms and conditions of service were spelt out in a letter of appointment dated the same day. The monthly salary was set at Kshs 28,578/-.
2. On 12 August 2013 the Claimant lodged a Memorandum of Claim against the Respondent stating the issue(s) in dispute as *non-payment of salary in lieu of notice, leave, unlawful termination and compensation*.
3. The Claimant in the Memorandum of Claim sought a total of Kshs 171,586/- as terminal dues and declarations that he was a permanent employee and that his termination was unfair/unlawful.
4. The Respondent filed a Response on 6 September 2013 and denied that the Claimant was entitled to leave, worked Monday through Sunday and during public holidays and was not paid his salary for July 2013.
5. The Respondent also pleaded that it declared the Claimant redundant after completion of its Kikambala Housing project and offered the Claimant full terminal dues but he refused to collect the same.
6. The Respondent further denied the termination of the Claimant was unlawful or in breach of contract and asked the Court to dismiss the Claim with costs.

Issues for determination

7. Considering the admission by the Respondent that it declared the Claimant redundant because it had completed a project it was having in Kikambala, only two broad issues arise for determination and these are whether the redundancy was unfair and if so appropriate remedies.

Whether the redundancy was unfair

8. The Claimant testified that he was verbally terminated on 22 July 2013. He stated that on the material day he worked until 5.00 pm when he and other employees were called to a meeting by the Personnel Manager. The Respondent's Director was present.
9. In the meeting several names of employees were called and they were informed not to report to work the next day but to report at the Respondent's Nyali offices.
10. On 23 July 2013 the Claimant reported but was informed by the Accountant his final dues were being calculated and the next day he reported again and was offered Kshs 20,000/- without a breakdown.
11. The Claimant stated he was told he would be called when required. No termination letter was issued.
12. The Respondent's Accountant Mr. Shahame Aziz told the Court that the Respondent had a housing project in Kikambala and when the project was nearing completion in July 2013, the Directors decided to release some staff before commencement of a new project in Kitengela. All the employees were called and informed verbally.
13. The witness also testified that the Respondent did not terminate the services of the Claimant and that the Claimant did not turn up to collect his salary for July 2013 or appear at the Respondent's meeting with the employees.
14. The testimony by Mr. Aziz seems to suggest that the Claimant among other employees were declared redundant.
15. Section 40 of the Employment Act prohibits an employer from terminating the services of an employee on account of redundancy unless the employee is notified personally in writing and the local Labour Officer is also informed. The employer is also expected to consider seniority, skill, ability and reliability of each employee, pay off pending leave in cash, pay one month's wages in lieu of notice and severance pay.
16. It is the responsibility of the employer to comply with the processes enunciated in section 40 of the Act. The Respondent herein has failed to show that it notified in writing both the Claimant and the local labour officer of the intended redundancy. The redundancy was therefore procedurally unfair.
17. Under section 45(2)(b)(ii) of the Employment Act, the Respondent was required to prove that the reasons for redundancy were valid and fair reasons based on its operational requirements. Apart from the testimony that the Kikambala housing project was coming to an end there was no attempt by the Respondent to meet the threshold set out.
18. The Court also notes that the Claimant's letter of appointment indicated he would be based at Miritini and the Respondent did not show the nexus between his place of employment and Kikambala project.
19. The Court finds that the Claimant was declared redundant and that the termination through redundancy was unfair for non compliance with the procedural fairness requirements of section 40 of the Employment Act. Further, the Court finds that the Respondent has failed to prove that the reason(s) for redundancy were valid and fair and based on its operational requirements.

Appropriate relief

Salary in lieu of Notice

20. Section 40(1)(f) of the Employment Act entitle an employee declared redundant to not less than one month's wages in lieu of notice. It was not disputed that the Claimant was earning Kshs 28,578/- per month. The Claimant is entitled to this relief.

Severance pay

21. The Claimant was employed on 8 May 2012. The evidence before Court is that he was declared redundant on or around 27 July 2013 after about 15 months. Pursuant to section 40(1)(g) of the Employment Act he would be entitled to severance pay equivalent to about 19 days pay.
22. Using the correct formula, the Claimant's daily pay, multiplied by 19, the Claimant would be entitled to Kshs 20,883/- as severance pay.

House allowance

23. The Claimant's letter of appointment provided that his gross monthly wages would be Kshs 28,578/- or net of Kshs 25,000/-. The letter made reference to other benefits of employment but these were not set out.
24. Section 31 of the Employment Act require an employer to provide at his own expense reasonable housing accommodation or pay to an employee sufficient sum as house allowance to enable the employee obtain reasonable accommodation.
25. It is not clear whether the gross monthly wage was inclusive of house allowance. The said sum was not below the gazetted minimum wages. If it was below the prescribed minimum, it would have been simple for the Court to determine a claim to house allowance.
26. The Court declines to find in favour of the Claimant because sufficient material was not placed before it.

Leave

27. The Claimant seeks Kshs 20,004/- on account of leave. He served for slightly over a year. Under clause 4 of the contract he was entitled to 21 days paid annual leave.
28. Under sections 10(3) and (7) and 74 of the Employment Act the Respondent should have produced records to ascertain the Claimant's pending leave days. None was produced and the Court finds in favour of the Claimant.

Unpaid overtime

29. The parties did not lead any evidence as to the official working hours agreed between the parties. Regulation 5 of the Regulation of Wages (General) Order provides that the normal working week shall consist of not more than fifty-two hours spread over six days of the week.
30. For reasons similar to those discussed under the claim for leave, the Court finds in favour of the Claimant.

Unpaid salary for July 2013.

31. It was not contested that the employees were informed about the ending of the Kikambala project on 22 July 2013 and directed to report at the Respondent's Nyali offices.
32. Pursuant to sections 18 and 49(1)(b) of the Employment Act, an employee is entitled to proportion of wages for days worked. The Respondent's witness stated that the Claimant had not collected his July 2013 wages though the amount was not mentioned.
33. In this regard, the Court finds in favour of the Claimant as prayed.

Compensation

34. The Claimant pleaded that he claims compensation pursuant to the Labour Institutions Act and the Industrial Court Act. He sought a declaration that the termination of his employment was unfair. But there was no prayer for compensation. Although the pleadings were filed by the Claimant acting in person, an advocate later came on record and the necessary amendment was not made to amend the pleadings.
35. The Court has reached a conclusion that the redundancy was unfair. Compensation equivalent to a number of months' gross wages not exceeding twelve months is one of the primary remedies for unfair termination. It is a discretionary remedy and the Court is enjoined by section 49(4) of the Employment Act to consider any, some or all of the thirteen factors listed.
36. The Claimant served the Respondent for a relatively short time. As a mechanical engineer his prospects of securing alternative employment are above average. Coupled with the fact that legal counsel came on board, and that the parties did not comply with the Court orders as to the filing of submissions, the Court declines to exercise its discretion and make an award under this head.

Conclusion and Orders

37.The Court finds and holds that the Claimant was declared redundant and the declaration was unfair because the Respondent did not follow a fair procedure or prove the reasons for the redundancy as valid and fair reasons based on its operational requirements.

38.The Claimant is awarded and the Respondent is ordered to pay the Claimant

a. One month salary in lieu of Notice	Kshs 28,578/-
b. Severance pay	Kshs 20,883/-
c. Pay in lieu of leave	Kshs 20,004/-
d. Unpaid overtime	Kshs 3,453/-
e. Unpaid salary for July 2013	Kshs 20,957/-

TOTAL **Kshs 93,875/-**

39.Claimant to have costs of the Cause.

Delivered, dated and signed in open Court in Mombasa on this 16th day of May 2014.

Radido Stephen

Judge

Appearances

Ms. Omolo instructed by Lamanya Katee & Co. Advocates for Claimant

Ms. Tsuma instructed by Godfrey Mutubia & Co. Advocates for Respondent